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REPORTS OF CASES

13

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON

BETWEEN

APRIL 4, 1893, AND NOVEMBER 13, 1893.

ROBERT G. MORROW,
REPORTER.

VOLUME 24.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
* LAW PUBLISHERS AND LAW BOOKSELLERS.
1894.

OP 1

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Rec. Oct 31, 1894.

ERRATA.

The note to the case of *Noland v. Bull* on page 481 was appended by mistake; it has no application to that case.

OFFICERS
OF
THE SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

WILLIAM P. LORD, - - - - - CHIEF JUSTICE
ROBERT S. BEAN, - - - - - ASSOCIATE JUSTICE
FRANK A. MOORE, - - - - - ASSOCIATE JUSTICE

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

OREGON.

HUGHES *v.* HOLMAN.

COSTS IN ELECTION CONTESTS.—Under the rule announced in the case of *Wood v. Fitzgerald*, 3 Or. 568, costs cannot be allowed to the prevailing party in election contests; but the correctness of this ruling is doubtful.

Multnomah County: E. D. SHATTUCK, Judge.

This is a motion to recall the mandate in the case of *Joseph A. Hughes v. Edward Holman*, reported in 23 Or. 481, and to modify the judgment in so far as it allowed costs and disbursements to the prevailing party. After consideration, the court rendered the following oral opinion:

The motion to recall the mandate in this cause, and for a modification of the judgment as to the allowance of costs to the respondent, is granted upon the authority of the judgment of this court in the case of *Wood v. Fitzgerald*, 3 Or. 568. While the court feels bound to respect that decision as the law of the present case, its correctness is doubted, and where a question is properly presented and brought here on appeal, it will be reëxamined.

Points decided.

[Argued March 10; decided April 4; rehearing denied July 31, 1893.]

MARQUAM v. SENGFELDER.

[S. C. 32 Pac. Rep. 676.]

1. **LIEN OF CHATTEL MORTGAGE—INTEREST OF MORTGAGEE.**—In Oregon a chattel mortgage creates more than a mere lien; after condition broken, it gives a right to possession—a qualified ownership of the property mortgaged. *Case Threshing Machine Co. v. Campbell*, 14 Or. 460, approved.
2. **CHATTEL MORTGAGE—PLEDGE—EQUITABLE LIEN—MORTGAGE LEASE.**—A stipulation in a lease that "All personal property in said premises, including furniture and household goods of every description, shall be at all times liable for rent of said premises; and in case of the violation of any of the provisions of this lease by the lessee, the lessor may terminate this lease and hold any property found thereon for any arrears of rent or damages," does not create a chattel mortgage, since the title to the property is not transferred; nor does it create a pledge, for possession was not delivered; it creates only an equitable lien.
3. **EQUITABLE LIEN—FRAUD.**¹—The same rules that determine the priority and validity of chattel mortgages, apply with equal force and like effect to equitable liens; and therefore, under subdivision 40 of section 776 of Hill's Code, an unrecorded lien created by a lease creates only a presumption of fraud, which may be rebutted. *Marks v. Miller*, 21 Or. 317, approved and followed.
4. **DESCRIPTION IN CHATTEL MORTGAGE—"FURNITURE" AND "HOUSEHOLD GOODS" DEFINED.**—In a chattel mortgage, or an equitable lien, a description is sufficient if it will enable third persons to identify the property by inquiry or by location; thus a description of the chattels as "all personal property, including furniture and household goods of every description," is sufficient to create a lien on all personal chattels which may contribute to the use or convenience of the householder, or the ornament of his house, under the description of "furniture," and on every household article of a permanent nature which is not consumed in its enjoyment under the term "household goods"; but it will not cover wines, liquors, or groceries.
5. **FRAUDULENT CONVEYANCE—PREFERRING CREDITORS.**—A debtor, even in failing circumstances, may prefer a creditor, and may appropriate his property to the satisfaction of such creditor's claim (*Kruse v. Prindle*, 8 Or. 163, approved and followed); nor is it material that the creditor knew his debtor's financial condition.

¹ NOTE.—The opinions in this case, in *Marks v. Miller*, and in *Meier v. Hess*, 23 Or. 599, were written under the law as it stood before the act of 1893 (Laws, 1893, 30).—REPORTER.

² NOTE.—See the extended definitions of these two words given in 8 Am. & Eng. Enc. 896, and 9 *id.* 782.—REPORTER.

24	3
134	90
24	2
38	516
24	2
43	570
43	575

Statement of the case.

6. EVIDENCE OF FRAUD.—The mere fact that when an officer went to the debtor's store for the purpose of levying an attachment, the debtor requested him not to close it, does not necessarily prove that any secret trust existed between the debtor and another to whom he had previously given a chattel mortgage on his stock of goods, even though the debtor was in failing circumstances.
7. EVIDENCE OF FRAUD.—The fact that after an officer had executed an attachment on a debtor's stock of goods, another creditor to whom the debtor had given a chattel mortgage thereon consented that the debtor's employes might take some of the attached property in payment of the amount due them, does not, of itself, show an intent by the creditor to protect the debtor, where he gave such consent under advice that the debtor's employes were preferred creditors.

Multnomah County: GEO. H. BURNETT, Judge.

Defendants appeal. Modified.

STATEMENT BY MOORE, J.—This is a suit by P. A. Marquam against Chas. Sengfelder, Wilson Thompson, F. C. Barnes, and others to establish and foreclose a lien on certain personal property for the now payment of rent. The material facts are as follows: On November 10, 1891, the plaintiff entered into a written contract with the defendant Sengfelder, under their hands and seals, whereby he leased to the latter stores numbered one hundred and twenty-five and one hundred and twenty-seven on Morrison Street, in the Marquam Block, Portland, Oregon, to be used as a restaurant and confectionery store for the term of three years, at a monthly rental of two hundred and fifty dollars for the first year, three hundred dollars for the second, and four hundred dollars for the third, payable in advance. Said lease contained the following clause: "All personal property, including furniture and household goods of every description, to be at all times liable for rent of said premises. In case of violation of any of the provisions of this lease by the lessee, the lessor may terminate this lease, and hold any property found thereon for any arrears of rent or damages." This lease was not filed or recorded, and neither the subsequent mortgagee nor any of the attaching creditors of Sengfelder had any notice or knowl-

Statement of the case.

edge thereof. On December 3, 1891, the lessee went into possession of the demised premises, paid the installments of rent to January 31, 1892, and operated a restaurant and confectionery store there until February 17, 1892.

On January 22, 1892, Sengfelder was indebted to the Portland National Bank of Portland, Oregon, in the sum of one thousand seven hundred dollars, and on that day he executed and delivered to said bank a promissory note for that amount, which was signed by himself, by Mary A. Sengfelder, his wife, and by Wilson Thompson, his step-father-in-law. On the said seventeenth day of February, 1892, the bank assigned said note to Thompson, before maturity, and in lieu thereof took a note for said amount signed only by said Thompson. Sengfelder, on the same day, executed and delivered to Thompson his note, payable on demand, for the amount due the bank and other indebtedness to Thompson, amounting in all to one thousand nine hundred and ten dollars and forty cents, and, to secure the payment thereof, executed and delivered to Thompson a chattel mortgage upon all the personal property in said stores, particularly describing the same. This mortgage was duly filed on the day of its execution; and about two hours after such filing Thompson demanded payment of the note, and in default thereof took possession of said goods and chattels. After Thompson had taken possession of the goods, the defendant Barnes commenced an action against Sengfelder in a justice's court of Multnomah County, to recover the sum of one hundred and thirty-four dollars, and, at the same time, caused a writ of attachment to be issued and delivered to a deputy sheriff for execution. That night, between ten and eleven o'clock, the officer appointed a person to take charge of the restaurant, and on the next day took possession of said goods and chattels, and thereafter other creditors levied writs of attachment upon the same property. After the officer had executed Barnes' writ, Thomp-

Statement of the case.

son consented that the help which had been employed by Sengfelder might take some of the attached property in payment of the amounts due them from the latter, and some of the goods were removed from the storerooms for that purpose, but were returned by the officer.

On March 2, 1892, after the defendant Barnes had reduced his attachment claim to a judgment, and was about to sell under execution, P. A. Marquam, the plaintiff herein, exhibited his bill in equity, claiming that the provisions of his lease with Sengfelder created a chattel mortgage on everything in the establishment, and praying a foreclosure for unpaid rent, and for the appointment of a receiver. All parties, except Wilson Thompson, consenting, the property was turned over to the receiver, and by him sold in separate classes, as follows: The furniture and fittings for thirteen hundred dollars; the wines and liquors for a hundred and twenty dollars; and the candies, groceries, and canned goods for forty-four dollars. All the defendant creditors, except Thompson and Barnes, suffered default, while Sengfelder answered, but his claims do not affect the questions raised on this appeal. Marquam claims a first lien for rent on the furniture, liquors, and goods; Thompson claims that his recorded chattel mortgage should be declared a first lien on all the property; while Barnes insists that the Marquam lien is void for uncertainty of description, and that the Thompson mortgage is fraudulent, and was made to hinder and delay the creditors of Sengfelder. These issues were referred to Sanderson Reed, Esq., who reported that Marquam was entitled to a first lien upon the entire fund derived from the sale of the property; that Wilson Thompson was entitled to a second lien on the entire fund; and that the defendant Barnes was entitled to a third lien. A decree having been entered in accordance with this report, the defendant Thompson appeals, insisting that he should have precedence over Marquam, while the defendant

Argument of counsel.

Barnes appeals against both Thompson and Marquam. Modified.

Frank V. Drake, for appellant F. C. Barnes, contended that the evidence showed a collusive action between Sengfelder and his father-in-law Thompson, to hinder and defraud the former's creditors; that Thompson's attempted possession under his recorded chattel mortgage was insufficient; that the chattel mortgage was void, at least as to the stock on hand, because the stock was being disposed of in the course of trade.

William M. Cake and *Glen O. Holman* (*Harry M. Cake* on the brief), for appellant Wilson Thompson.

1. It is undisputed that Sengfelder actually owed Thompson over nineteen hundred dollars, and we contend that Thompson had a right to take any and all security that he could obtain. Thompson's chattel mortgage cannot be held fraudulent by reason of the fact that Thompson may have been in a better position than Barnes or any other of his creditors to compel Sengfelder to execute the chattel mortgage, providing, always, that the consideration actually passed. It is no more of a fraud for Thompson to take a chattel mortgage to secure his claim than it is for the attaching creditors to levy an attachment to secure theirs; and the fact that the giving a chattel mortgage incidentally operates to hinder other creditors in collecting their debts does not constitute fraud. The case of *Scott v. McDaniel*, 67 Tex. 315, is a case identically in point.

As long as a debtor retains dominion over his property he may make any disposition of it that he chooses, and, though known to be in failing circumstances, he may prefer one creditor to another by a sale or mortgage, either as payment or security: *Burrill on Assignments*, 218; *Randall v. Shaw*, 28 Kan. 419; *Tootle v. Colewell*, 30 Kan. 125; *Barley v. Mfg. Co.* 32 Kan. 73; *Farwell v. Nilson*, 133 Ill.

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45; *Aulman v. Aulman*, 71 Iowa, 124 (60 Am. Rep. 783); *Hill v. Stockwell* (Iowa), 23 Fed. 432; *Gilbert v. McCorkle*, 11 N. E. 296; *Cory v. McKay*, 40 Fed. 858.

The provisions of our statutes relating to fraudulent conveyances are contained in sections 3053, 3059 to 3065, Hill's Code. It is very distinctly provided that a transferee for value will be protected unless he participated in the fraudulent intent of his grantor; so that, in the first place, it must be found that Sengfelder intended to defraud his creditors by executing this chattel mortgage, and then that Thompson not only knew of that intention, but actually participated in the fraud: *Kruse v. Prindle*, 8 Or. 158.

2. Passing now to the second point, it appears that the respondent Marquam claims a first lien upon all the property in the Marquam Café by virtue of this clause in his lease, viz: "All personal property, including furniture and household goods of every description, to be at all times liable for rent of said premises. In case of the violation of any of the provisions of this lease by the lessee, the lessor may terminate this lease and hold any property found thereon for any arrears of rent or damages."

First—It is conceded that appellant Thompson had no notice of the clause referred to, that respondent Marquam's lease was not filed for record, and that Marquam was not in possession of the property at the time Thompson obtained his chattel mortgage and took possession. In Oregon there is no landlord's statutory lien for rent or right of distress; therefore, any lien claimed must be created by special contract between the landlord and tenant. Marquam must rest his claim for a lien under this clause upon the view that his lien clause constitutes a chattel mortgage upon the property. If this is so, the clause in question is subject to all the rules governing chattel mortgages. Marquam not being in possession, and his chattel mortgage not having been filed for record, section 776, clause 40, of

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Hill's Code, creates a presumption of fraud against his mortgage. In order, then, to establish his priority over the chattel mortgage of the appellant Thompson, Marquam must overcome the legal statutory presumption of fraud, which we insist he has not done.

Second—Still considering this lien clause to constitute a chattel mortgage, we contend that there is no description of property here which renders the mortgage of any value, and that it is void for uncertainty by reason thereof. The clause in the lease says "all personal property, including household goods of every description." What personal property does the landlord mean? It does not refer to any personal property, but all personal property. There is no clause which describes any personal property, or even attempts to give a description. It is not a question as to whether or not the description is imperfect, but it is the fact that there is no description at all. In all the cases upon this point, the description, where it is decided sufficient, speaks of stock, tools, and chattels, crops, goods, wares, and merchandise, thus bringing the description to a distinct character or class of personal property; but in this clause it is impossible to determine what personal property the landlord intended to hold: Taylor on Landlord and Tenant, § 424A, p. 505; *Buskirk v. Cleveland*, 41 Barb. 610; *Green v. Jacobs*, 5 Rich. (S. C.) 280.

Third.—Those cases holding clauses in leases to be chattel mortgages are based upon facts showing the intent of the parties to so consider their agreement, and they all show something more than is contained in this lease: Jones on Liens, § 543, *et seq.*; Jones on Chattel Mortgages, § 13; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Merrill v. Ressler*, 37 Minn. 82; *Wright v. Bircher*, 72 Mo. 179. The clause in this lease is a bare provision for the landlord to hold the property for such arrears of rent as may exist at the termination of the lease. At best, it confers upon the landlord only the right to enter upon the premises and

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take sufficient of the property to satisfy any unpaid portion of the rent at the time of taking the property, and cannot be any stronger than a statute giving a right of distress for rent. Under such a statute, it is held that a landlord cannot take the goods from a mortgagee: Taylor on Landlord and Tenant, § 677.

Fourth.—We deem the law to be well settled that the landlord has no right to claim a lien under such a clause until he has terminated the lease, which in this case he has refused to do: Wood on Landlord and Tenant, 933; Taylor on Landlord and Tenant, § 504, note 2, and § 573; Jones on Liens, § 550; *Butterfield v. Baker*, 5 Pick. 522; *Munsel v. Carew*, 2 Cush. 50; *Wilkinson v. Ketter*, 69 Ala. 435.

U. S. Grant Marquam, for Respondent.

1. The description of the property in this lease is "all personal property in said premises, including furniture and household goods of every description." The premises were described in said lease as storerooms Nos. 125 and 127, Morrison Street, in the Marquam Block, Portland, Oregon. The contention of counsel seems to be that each article must be specified, but the following cases show otherwise: Jones on Chattel Mortgages, 3d Ed. §§ 53 and 54; *Lawrence v. Evarts*, 7 Ohio, § 196; *Harding v. Colburn*, 12 Met. 333 (46 Am. Dec. 680); *Morse v. Pike*, 15 New Hamp. 529; *Burditt v. Hunt*, 25 Me. 419 (43 Am. Dec. 289); *Wolfe v. Darr*, 24 Me. 104; *Winslow v. Merchants Ins. Co.* 4 Metc. 306 (38 Am. Dec. 368); *Smith v. McLean*, 24 Iowa, 322; *Rawlins v. Kennard*, 26 Neb. 181.

The court said the principle to be deducted from these cases is that any description which will enable third parties to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient.

2. Answering the second point made by the appellant Thompson, we insist that the words of the lease, taken

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with the intention of the parties, create a lien. No technical words are necessary: Pomeroy's Eq. Jur. § 1237; *Flagg v. Mann*, 2 Sumner, 486; *McCaffrey v. Woodin*, 65 N. Y. 459 (22 Am. Rep. 644); *Wright v. Bircher*, 5 Mo. App. 323; *Fejavary v. Broesch*, 52 Iowa, 88 (35 Am. Rep. 261).

MR. JUSTICE MOORE delivered the opinion of the court.

1. The respondent contends that the clause of the lease above quoted created a lien upon all the personal property on the leased premises, which in equity should be treated as a chattel mortgage. The said clause does not create a chattel mortgage, because the title to the property was not transferred; nor does it create a pledge, because possession thereof was not delivered. It was formerly held in this state that a chattel mortgage created only a lien upon personal property: *Chapman v. State*, 5 Or. 435; *Knowles v. Herbert*, 11 Or. 240 (4 Pac. Rep. 126): but in *Case Threshing Machine Co. v. Campbell*, 14 Or. 465 (13 Pac. Rep. 324), this court, by THAYER, J., in our judgment, announced the correct doctrine, and held that a chattel mortgage created more than a lien, and that the mortgagee after condition broken has a right to the thing, which he may maintain by an action in the nature of *replevin*, to recover it, if, upon demand, delivery thereof be denied.

2. In a clause of a written agreement which provided that in case of default the parties were authorized "to take immediate possession of all goods, wares, and merchandise, lumber and shingles, and the personal property, now in our possession, and belonging to us," it was held that it was nothing but a naked power, not coupled with any interest, and could not operate to give any right to the property itself until reduced to possession: *Holmes v. Hall*, 8 Mich. 66 (77 Am. Dec. 444). Where a stipulation of a lease provided that "all goods, wares, and merchandise, household furniture, fixtures, or other property which are, or

shall be placed, on said premises, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property to secure the rent due, or to grow due, on this lease," the court held that it did not create a mortgage: *Dalton v. Laudahn*, 27 Mich. 529. In a covenant of a lease which contained the following: "And the said parties of the second part hereby pledge and bind all improvements and machinery which they may put on said premises for the payment of the rent aforesaid, and for the due performance of all other covenants herein contained," the court held that it did not create a mortgage, nor purport to mortgage after acquired property; that it was simply a contract for a lien whenever the rent became in arrears, and would constitute a lien in equity. The highest claim which can reasonably be made for the stipulation in the lease in the case at bar is that it created an equitable lien. It is an express executory agreement in writing, whereby the lessee indicated an intention to make the property therein described a security for the rent, which is enforceable against the property in the hands of the lessee, and of his voluntary assignees, purchasers, and encumbrancers with notice: 3 Pom. Eq. Jur. § 1235.

3. The claim being a lien, and creating no property right, nor interest analagous to property, but only a mere personal right and obligation, by means of which the plaintiff is entitled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon the thing itself (3 Pomeroy Eq. Jur. § 1234), can this remedy be enforced against one who has acquired the thing without notice of the plaintiff's claim? In the case of *Fejavary v. Broesch*, 52 Iowa, 88 (2 N. W. Rep. 963; 35 Am. Rep. 261), SEEVERS, J., in construing a similar clause in a lease which provided that the lessor should have a perpetual lien upon certain personal property, as security for rent, says: "Technically, it is said, the instrument in this case cannot be regarded

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as a mortgage, because it does not contain a grant or conveyance of the property. But clearly it creates a lien or equitable charge, and the right of a party to execute it, and its validity, must depend on the same principle as a mortgage." The law which determines the validity of a chattel mortgage must be applied with equal force and like effect to such equitable liens. In *Marks v. Miller*, 21 Or. 317 (14 L. R. A. 190; 28 Pac. Rep. 14), it was held that under our statute, when a chattel mortgage has not been filed, a presumption of fraud is created from the retention of possession of the mortgaged property by the mortgagor, which may be rebutted by showing that it was made in good faith, and for a valuable consideration. We think it unnecessary to quote the testimony offered upon this branch of the question, since, in our judgment, it conclusively shows that the lien was created in good faith and for a valuable consideration.

4. Was the specification in the lease of "all personal property in said premises, including furniture and household goods of every description," sufficient to create a lien? Mr. Jones, in his work on Chattel Mortgages, section 54, says: "A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient." "The identity of the property is not, in such cases, ascertained by any specific description which distinguishes it from other property of the same kind or species, but by its locality": *Lawrence v. Evarts*, 7 Ohio St. 194. "Apparently it seems a more bald description to say 'all my household furniture,' than to enumerate the articles and describe them as 'two dozen of chairs, five tables,' etc.; but in reality the latter will require extrinsic evidence to identify the property as much as the former would": *Harding v. Coburn*, 12 Met. 333 (46 Am. Dec. 680). Thus it would appear that the description, "furniture and household goods," was sufficient (*Beach v. Derby*, 19 Ill. 617)

and, from their locality, the several articles thereof might be identified by extrinsic evidence; but could the articles described as "all personal property" be identified in this manner from the lease? In *Morrill v. Noyes*, 56 Me. 458 (96 Am. Dec. 486), DAVIS, J., clearly enunciates the rules for determining what property should be included in similar descriptions, as follows: "(1) The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be; and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value. (2) The vendor or mortgagor must have a present, actual interest in it, or concerning it. As is said in illustrating rule 14 of Bacon's Maxims, 'the law doth not allow of grants, except there be the foundation of an interest in the grantor.' There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract." Applying these rules to the case at bar, can it be said that the contract or specification in the lease included all the personal property, or that the minds of the lessor and lessee met and agreed upon what it should be? We think it could not; but this would not render the contract void as to such property as could be identified thereby: *Jones, Chattel Mortgages*, § 74. The word "furniture" means all personal chattels which may contribute to the use or convenience of the householder, or the ornament of the house (*Roper, Legacies*, 269); and the term "household goods" means every article of a permanent nature which is not consumed in its enjoyment: *Roper, Legacies*, § 253. The wines, liquors, and groceries are not "furniture," and they cannot be considered as "household goods," and hence the lease did not create any lien thereon.

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The return of the receiver shows that the wines and liquors were sold for one hundred and twenty dollars, the groceries and canned goods for forty-three dollars and seventy-five cents, and that the restaurant furniture, and household goods, upon which plaintiff had a lien, brought one thousand three hundred dollars.

5. The defendant Barnes contends that Sengfelder's mortgage to Thompson was fraudulent. It is true that Sengfelder was in failing circumstances, and no doubt Thompson had a better knowledge of this fact than any other creditor; but would this make the transaction fraudulent? If Sengfelder had given his mortgage to the bank to secure the note it held against him, no one would contend that such act would have been fraudulent. A debtor in failing circumstances may prefer a creditor, and appropriate his property to the satisfaction of such creditor's claim: *Kruse v. Prindle*, 8 Or. 158; *Burrill, Assignments*, 218; *Bump, Fraudulent Conveyances*, 314. When Thompson secured the assignment of the note from the bank he had a *bona fide* claim against Sengfelder, and, since the latter could have preferred the bank, he could, in like manner, have preferred Thompson. When the mortgage was executed and filed, Thompson demanded payment of the note, and, upon default, took immediate possession of the chattels. This gave him a conditional title to the goods, and the possession thereof, for the purpose of foreclosing his mortgage, and such possession was taken before any attachments were levied.

6. Some testimony was taken for the purpose of showing that Sengfelder's mortgage to Thompson was executed for a fraudulent purpose. The officer who levied the writ of attachment for Barnes swears that when he went to the restaurant for that purpose Sengfelder requested him not to close up the place, while the latter swears that such request was made upon the levy of a former writ. Admitting that he made this request at that time, this does not,

in our judgment, necessarily prove that there was any secret trust existing between him and Thompson. He had an interest as mortgagor, and may have entertained a hope that he could adjust the matter. The mortgage given to secure nineteen hundred and ten dollars and forty cents included all Sengfelder's property, but when it was sold by the receiver fourteen hundred and sixty-three dollars and seventy-five cents was the full amount received therefor. This, in our opinion, purges the transaction of every badge of fraud.

7. Sengfelder swears, in relation to the attempt to remove the goods to pay the help, that Geo. W. Hazen, the agent of the bank, who had known Mr. Thompson for several years, told the latter that the law required attaching creditors to pay the help, and that Mr. Thompson was trying to observe Mr. Hazen's advice. The Session Laws of 1891, p. 81, provide that when goods are attached the laborers in defendant's employ shall have a preferred claim, within certain limits as to time and amount; but while the attached goods could not have been appropriated in the summary manner here attempted, we do not think Thompson's act indicated an intent to protect Sengfelder.

There was some testimony taken before the referee which tended to prove that the defendant, Sengfelder, with the knowledge of plaintiff, sold in the ordinary course of business articles of personal property, consisting of stock in trade, but the pleadings having raised no issue upon this question, it was properly held irrelevant.

The decree of the court below will be MODIFIED in accordance with this opinion.

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[Argued March 23, 1893; decided April 4, 1893.]

ODD FELLOWS' ASSOCIATION v. HEGELE.

[S. C. 22 Pac. Rep. 679.]

1. **PARTY-WALL EASEMENT.**—Easements in party walls are mutual, and relate to the wall only; they continue only so long as the walls remain safe and suitable for use.
2. **PARTY-WALL AGREEMENT—EASEMENT.**—A provision in a party-wall agreement that the rights of the parties shall continue “so long as the wall shall stand,” does not mean so long as any fragment of the wall itself shall remain, but it means so long as the wall shall continue fit and suitable for its purpose; and this construction of such a clause does not confer any perpetual right or easement.
3. **RESCISSION OF CONTRACT—EQUITY—ULTRA VIRES.**—An agreement will not be rescinded at the instance of a corporation as being *ultra vires* and voidable, after the parties have acquiesced therein for more than fifteen years, and large expenditures have been incurred and improvements made upon the faith thereof, and the corporation has received commensurate benefits and been relieved from burdensome obligations.
4. **CORPORATIONS—ULTRA VIRES.**—Where a corporation organized to buy and hold real estate for the use and occupation of the lodges of a social order, and to generally advance the good of the order, has erected a building for the use of the different lodges, and rents the lower part for stores, it has power to grant to another person the use of an alley across the premises in consideration of reciprocal benefits; such a grant is not necessarily *ultra vires* because it deprives the corporation of the exclusive use of all the lot, for it may be essential to the better use and enjoyment of the building.

Multnomah County: LOYAL B. STEARNS, Judge.

Suit by the Odd Fellows' Hall Association of Portland, Oregon, against Charles Hegele, to rescind and cancel a party-wall agreement. From a decree for defendant, plaintiff appeals. Affirmed.

This is a suit for the rescission and cancellation of a party-wall agreement, in writing, entered into by the plaintiff and the grantors of the defendant on the fifteenth day of May, 1876. The plaintiff is a private corporation, incorporated under the laws of this state, and, among other things, is authorized and empowered to buy real

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estate, and erect buildings thereon suitable "for the use and occupation of the several lodges and encampments of the Independent Order of Odd Fellows in the City of Portland, as well as such other buildings as may be erected for the benefit of said lodges and encampments, and of doing any and all other things necessary and essential to carry on said business, or to advance the good of said order in said city." The facts substantially are that on the tenth day of April, 1869, the plaintiff purchased of G. W. Vaughn, and the said Vaughn, by deed of bargain and sale, but without covenants of warranty, conveyed to the plaintiff, all lot one in block fifteen in the City of Portland, Oregon. The consideration of said deed was twenty-two thousand dollars, and an agreement on the part of the plaintiff to erect during the year 1869, and forever maintain, certain walls in said agreement described on the line between said lot one and lot two, and on the line between said lot one and lot eight, in said block fifteen, so that one-half of the walls should rest upon lot one, and the other half upon lots two and eight; and by the said agreement the said G. W. Vaughn, his heirs or assigns, were granted the right and perpetual privilege and license to use said walls for the construction and support of any brick or stone buildings which the said Vaughn, his heirs or assigns, might thereafter erect on said lots two and eight, or either of them. The lot is one hundred feet long and fifty feet wide. The plaintiff shortly thereafter procured plans and specifications for a building fifty feet wide and ninety-five feet long, and erected the building now standing upon said lot one according to said plans and specifications. The wall of said building, for a distance of ninety-five feet from the east line of said lot one, rests upon the line between lots one and two, but the plaintiff never erected a wall upon the remaining five feet along the line between lots one and two, nor along the line between lots one and eight, but did erect a wall running the

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whole width of said lot, parallel with, and five feet east of the line between lots one and eight. On the tenth day of August, 1875, C. A. Alisky and the defendant purchased the east twenty feet of lot eight in block fifteen, and on the twenty-fifth day of March, 1882, the said Alisky conveyed all his interest therein to defendant, who now owns the whole thereof.

On the fifteenth day of May, 1876 the said Alisky and the defendant, then owning lot two, and the east twenty feet of lot eight, in said block, as parties of the first part, entered into an agreement with the plaintiff, as the party of the second part, wherein and whereby the said Alisky & Hegele agreed to remove the water closets then on the west end of said lot one, and erect them on lot two near the southwest corner of lot one, "with good and convenient passage ways leading to the first and second floors of the building on said lot one, block fifteen, said passage ways to be so located as to leave an alley way in the rear of the west end of said building, the whole width of said building on the ground thereof, and five feet wide, said alley way to be kept in repair by the said parties of the first part, their heirs and legal representatives and assigns, and said alley way and water closets to be used in common so long as the present west wall on said building on lot one shall stand, by the said parties of the first part and second part, their, and each of their, successors, heirs, and assigns;" and by the said agreement, the parties of the first part further covenanted and agreed to erect and keep in repair a "passage way from the door now in the west wall of the building on said lot one, in the second floor of said building, to the water closet to be erected on the premises of said parties of the first part, near the southwest corner of said lot one, and level with the second floor of said building on said lot one, said passage way to occupy in width the distance between the west wall of the building now on said lot one, and the west line of said lot

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one, and to extend south from the doorway aforesaid to said water closet, said passage way to be used in common as long as the west wall of said building on said lot one shall stand, by said parties of the first part and second part, and each of their successors, heirs, and assigns. Upon the said considerations, the said parties of the first part do further covenant and agree, as aforesaid, to so construct the said improvements, and the improvements on their own premises, as not to cut off the light from the south side of the room in the southwest corner of the second floor of said building on lot one, nor from the west end of the stores on the ground floor thereof, and do covenant and agree to put in a skylight sufficient to throw light through the glass door in the west end of the hall on the second floor of said building on lot one; and lastly, the parties of the first part, upon the consideration aforesaid, do covenant and agree, as aforesaid, to accept the walls as now erected and completed upon said lot one, in full satisfaction of the said agreement between Vaughn and plaintiff, concerning the division and party walls, and to relinquish and cancel any and all claims and rights thereunder to any and all walls not already constructed upon the lines of said lots mentioned in the agreement last mentioned."

Plaintiff, on its part, among other things, covenanted and agreed that the parties of the first part should have an easement and right to use the west wall of the building on lot one as a party wall, and to occupy in common with the party of the second part the said alley ways and passage ways; that the parties of the first part should have the right of ingress and egress to the building about to be erected west of the said building on lot one, and through the main entrance and stairway and hall in the building on lot one, and through the door in the west wall of said building on the second floor; that the part of lot one lying north and west of said doorway should be used exclusively

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by the parties of the first part,—all rights and privileges as granted to continue no longer than said wall should stand.

After the execution of the said agreement, and during the year 1876, the said Alisky & Hegele erected a building upon lot two in said block, and so erected it as "not to cut off the light from the south side of the room in the southwest corner of the second floor of said building on lot one," and did remove the water closets mentioned in said agreement, the one on the ground floor onto lot two, according to said agreement, but the water closet on the second floor was not removed from lot one onto lot two, as specified in said agreement, but was removed to the south end of the alley or passage way leading from the west door to the second story, and placed on lot one just north of the south line thereof. The hall committee and the board of directors of plaintiff had knowledge of, and acquiesced in, without objection, and assented to, the location of the said closet where it now stands. In all other particulars the said Alisky & Hegele complied with and performed the said contract. Instead of having only a five-foot hall or passage way to said closet in the second story, Alisky & Hegele left and made a hallway about eight feet wide, and made the said closet larger than it was originally, and larger than they were required to do by said contract. The plaintiff and its tenants have had the use and benefit of said hallway and closet ever since its removal as aforesaid. By the erection of said closet where it now stands, it in no manner cut off or obstructed the light to the window of the room in the south side of the southwest room in plaintiff's building; whereas, if said closet had been placed in the location designated in said written agreement it would, to some extent, in the afternoons, have obstructed the light to said window, and thereby darkened said room.

Lewis L. McArthur (William D. Fenton and Earl C. Bronaugh on the brief), for Appellant.

Cyrus A. Dolph (Rufus Mallory and Jos. Simon on the brief), for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court.

The complaint contains an allegation to which no reference is made in the statement of facts, to the effect that the original agreement between the plaintiff and Vaughn was subsequently modified by a verbal agreement; but there is no evidence disclosed by the record to sustain such allegation, nor to show, if there was, that either Alisky or the defendant Hegele, the grantees of Vaughn, had notice of any modification of such agreement, so that we are not required to consider the effect of that allegation as a feature of the case.

1. The facts, as stated, show that the original agreement provided for the erection of party walls on lot one, which lot was one hundred feet long and fifty feet wide, so that one-half of such walls should rest upon lot one, and the other half upon lots two and eight; that shortly thereafter the plaintiff erected the building now standing upon lot one, ninety-five feet long, and thereby left a strip of ground five feet in width from east to west and fifty feet in length from north to south, between the rear wall of the building and the western boundary of lot one; and the facts also disclose the modifications which were effected in the original contract by the agreement of 1876 between the plaintiff and Alisky. The contention for the plaintiff is that the provision in the last agreement, "so long as the west wall of said building shall stand," when construed with reference to the provision that "no perpetual right or easement shall be thereby acquired" in the land of either party implies or gives the right to the plaintiff to remove the wall whenever, in the opinion of its directors, the convenience or necessities of the association may demand or require it; for the reason, it is argued, that if the expres-

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sion "so long as the west wall shall stand" shall be construed by the court to mean until such wall shall be destroyed by fire, or flood, or the ravages of time, the effect will be to create in the defendant a perpetual easement, contrary to the provisions of the contract. This result is based on the assumption that we will construe the expression "so long as the west wall shall stand" to mean, as counsel thinks, that if, after the destruction of the buildings, any fragment of the wall, or the wall itself, remains, though unfit for use, it still stands charged with the burdens and benefits of the easement. But we shall not so construe the phrase, as we think such construction would be inconsistent with its meaning, as well as the doctrine of property rights in land. Under the agreement, there was no grant of any easement in the land. By its terms each party possesses the right to a reasonable use of the wall, or to an easement of support to his building in it, "so long as the west wall shall stand," but it is equally plain by its terms, also, that such use or easement is not a perpetual party-wall easement. The agreement is binding on the parties during the existence of the wall, or, as it is phrased, "so long as it shall stand."

An explanation of this phrase may be aided by understanding the nature of an easement in a party wall, and the purpose it is designed to serve and accomplish. A party wall is a wall built partly on the land of another for the common benefit of both. The adjoining owners are not joint owners, or tenants in common, of the party wall. "Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other to the end that it may afford a support to the wall and buildings of such other": *Hoffman v. Kuhn*, 57 Miss. 746 (34 Am. Rep. 491). The purpose of the wall is to support the timbers of the contiguous buildings. The

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easements are mutual, and relate to the wall only, and necessarily continue no longer than the wall remains safe and fit for the purpose it was intended to serve. As long as the wall remains fit and suitable for use, the easements of support exist; when the wall becomes unfit, either from age or accident, the easement in it ceases. In *Campbell v. Mesier*, 4 John Ch. 334 (8 Am. Dec. 570), it is indicated that the easement is a grant in fee, and that the right of support continues longer than the existence and fitness of the old wall. But in *Sherred v. Cisco*, 4 Sandf. 480, it was held that if the wall be destroyed by fire or accident, the adjoining owners are not bound to rebuild it. The land becomes freed from all servitude in relation to the party wall, as in the case of two adjoining lots without buildings. SANDFORD, J., said: "It was argued that the fact of there having formerly been a party wall gives the right to have it continued for all time to come. To test this argument fairly, we will assume what is not proven, but may, perhaps, be fairly inferred, that the old wall was built by mutual agreement, and at the expense of the proprietors of the two lots. It is not disputed that each proprietor remained the owner in severalty of the ground on which half of the wall rested, and of course each owned in severalty one half of the wall. Neither party had a right to pull down the wall without the other's consent; and to that extent, the agreement upon which it was erected controlled the exclusive dominion which each would otherwise have had over half of the wall, as well as over the soil on which it stood."

2. The object of the wall is to support the houses of which it forms a part, and, so long as it stands and answers that purpose, it cannot be changed, or removed, or rebuilt, without an agreement therefor. But when that state of affairs occurs which renders the party wall useless, whether from fire or flood, the ravages of time, or accident, though it may still stand, "the mutual easements,"

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as DENIO, C. J., said, "have become inapplicable, and each proprietor may build as he pleases on his own land without any obligation to accommodate the other." So long as the wall stands fit and suitable for the original purpose for which it was erected, the right of support continues. But when, after the destruction of the buildings, it remains or stands dilapidated, or useless,—unfit and unsafe to be used as a party wall,—it does not stand, in legal contemplation, as a party wall. As illustrative of the general doctrine involved, we may further refer to *Heartt v. Kruger*, 121 N. Y. 386 (18 Am. St. Rep. 829; 24 N. E. Rep. 841; 9 L. R. A. 135); *Phillips v. Bordman*, 4 Allen, 147; *Miller v. Brown*, 33 Ohio St. 547; *Antomarchi's Exr. v. Russell*, 63 Ala. 359 (35 Am. Rep. 40); *Hoffman v. Kuhn*, 51 Miss. 746 (34 Am. Rep. 491); *Glenn v. Davis*, 35 Md. 219 (6 Am. Rep. 389). As we do not think the phrase "so long as the wall shall stand" is susceptible of the construction assumed, it does not violate the agreement by creating a perpetual party-wall easement. In *Hoffman v. Kuhn*, 51 Miss. 746, the court, after observing that each owner is bound to permit his portion of the wall to stand, and to do no act to impair or to endanger the strength of his neighbor's portion, so long as the object for which it was erected, to wit, the common support of the buildings, can be served, proceeded to say: "But the obligation ceases with the purpose for which it was used, namely, the support of the houses of which the wall forms a part. If these houses or either of them are destroyed, without fault upon the part of the owner, he is not bound to rebuild in exactly the same style, and exactly in the same spot because his neighbor demands it. That this is true where the wall itself is swept away is settled by authority. It must be equally so where the wall alone remains. A wall is but a portion of the house, and the one is valueless without the other. To hold that so long as the wall stands the owner whose house has been destroyed is com-

pelled to lose his lot, or to replace the destroyed building with another of exactly the same pattern, is to sacrifice the greater to the less, and to impose in perpetuity a servitude which was assumed only for a specific purpose."

3. It is next claimed that the agreement is *ultra vires* or voidable, for the reason that the plaintiff was thereby divested of the right to the exclusive use of the five feet of ground off the west end of the land owned by it, which, although not necessary for the purposes of the association when the agreement was made, became so, as it is claimed, by reason of the organization of new lodges since that date. The facts show that Alisky & Hegele performed the covenants contained in their agreement to the satisfaction of the plaintiff, the board of directors and stockholders. The claims made by them under the agreement of 1869 were understood by the association when the proposed agreement modifying it was submitted. The matter was then fully considered, and the agreement made, which for many years, so far as the evidence discloses, was entirely satisfactory to all the parties. There is no pretense of any fraud or misrepresentation. In fact the association desired to obtain relief from the agreement of 1869. That agreement imposed burdens, which, to say the least, were inconvenient for it to perform, and from which it sought to be relieved by the subsequent agreement. The rights surrendered by Alisky & Hegele, in the light of all the circumstances, were fully equal in value to all that were surrendered by the plaintiff. The improvements were made by Alisky & Hegele in pursuance of plans submitted to plaintiff's board of directors before the agreement was entered into, and they were made under the supervision of a committee of that board. The buildings were constructed to correspond with plaintiff's building at an extra expense of two thousand dollars, and so as not to cut off the light from the rooms of the association. All these improvements were made during the year 1876, and

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accepted in full satisfaction of, and in compliance with, the covenants on the part of Alisky & Hegele contained in the agreement. The agreements were recorded, and the buildings have been standing since their construction; so that, in both ways, there has been to every one interested a continuing notice of the terms upon which the rights of the respective parties under the agreement of 1869 had been modified and adjusted. Nor is it within the power of the plaintiff to place the other parties in the position they were before the agreement. Under such circumstances a court of equity does not listen with much satisfaction to the complaint of a company that transactions were illegal, or in excess of its powers, which it had approved, which were essential to its protection, and the benefits of which it received.

"The rule is a wholesome one," said HARLAN, J., "that requires the court in case of merely voidable contracts to withhold relief from those who, with knowledge of the facts, or with full opportunity to ascertain the facts, unreasonably postpone application for relief. Seasonable resistance cannot be predicated of a case of a merely voidable contract, where the party complaining has not simply been silent for twenty years, but with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract and treated it as valid": *Jessup v. Illinois R. R. Co.* 43 Fed. Rep. 483-503. And again, in *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (5 Sup. Ct. Rep. 525), the same distinguished judge said: "But it is not necessary to rest our judgment of affirmance of the decree of the court below upon any consideration of the character of these transactions. After seven years acquiescence in the lease, something more must be shown than that it was executed in excess of the power of the directors before the lessee can be required to surrender the profits he has made under it. The lease expired June 1, 1874. The disposition of the property was settled by the

agreement of March 15, 1876, and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained upon any fraudulent representations. Nothing was kept from the parties when it was executed. Indeed, all the transactions between the defendants and the company, from the time they took from Frost an assignment of the lease, were open and well known. There was no concealment had or attempted of anything that was done, and no just reason can be given for disturbing the settlement made." The same may be said here. In view of these considerations, it is manifest that after the parties have acquiesced for more than fifteen years in the settlement made by the agreement of 1876, upon the faith of which large expenditures were incurred and improvements made, and from which the plaintiffs have received commensurate benefits, and been relieved from some burdensome obligations, something more must be shown than that such contract was executed in excess of the powers of the corporation, or that the character of the transaction was such that it might have been avoided when it was made.

Thus far we have proceeded upon the hypothesis that the agreement of 1876 was voidable by the plaintiff, for the purpose of showing that, from the facts disclosed by the record, it is not entitled to avoid the contract, or to the relief asked. But we are not convinced that the agreement was in excess of the powers of the corporation. The plaintiff and the lodges are independent organizations. The plaintiff is a private corporation, and the lodges which occupy a part of the building are simply its tenants. The lower part of its building is occupied with stores. An alley such as this may be essential to the better enjoyment of the building and needful to it; and the fact that a right to use it may be given to an adjoining owner for reciprocal benefits, does not necessarily imply an excess of power.

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We are inclined to the opinion that the agreement is valid, and that the parties are bound thereby; so that in any view, as we regard the case, there was no error, and the decree is AFFIRMED.

[Argued March 27, 1893; decided April 10, 1893.]

BENN v. KUTZSCHAN.

(S. C. 32 Pac. Rep. 763.)

1. PROMISSORY NOTE—STIPULATION FOR ATTORNEY'S FEE—NEGOTIABILITY.—
A stipulation in a note for the payment of a reasonable attorney's fee in case of suit or action thereon does not destroy its negotiability.*
2. IDEM—LIABILITY OF INDORSER.—An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit, is as much liable for the attorney's fee as for the principal of the note.*

Multnomah County: E. D. SHATTUCK, Judge.

This is an action by Charles E. Benn against Gustav Kutzschan as indorser on a promissory note of M. F. Milburn. Defendant moved to strike out of the complaint that portion thereof relating to attorney's fees, and the motion was granted. Thereafter defendant suffered a default judgment for the amount of the note, and plaintiff now appeals from the order disallowing attorney's fees. Reversed.

Milton W. Smith (*Walter S. Perry* of counsel), for Appellant.

No appearance or brief for respondent.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an action brought against the indorser of a promissory note, of which the following is a copy:

*NOTE.—A note collecting and classifying the authorities touching the two questions here decided will be found with the case of *Dorsey v. Wolff*, 34 Am. St. Rep. 99.—REPORTER.

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"\$347.00.

PORTLAND, OR., May 19th, 1892.

"Ninety days after date, without grace, I promise to pay to the order of J. C. McCaffrey three hundred and forty-seven no hundredths dollars in U. S. gold coin, at Portland, Or., with interest thereon in like gold coin at the rate of 10 per cent per annum from maturity until paid, for value received. Interest to be paid after maturity, and, if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note; and in case suit is instituted to collect this note or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, such sum as the court may adjudge reasonable and just, in like gold coin, for attorney's fees in said suit or action.

"M. F. MILBURN,
"489 Starr St., Albina."

There are but two questions presented on this appeal. *First*, does a stipulation in a promissory note for the payment of a reasonable attorney's fee in case of suit or action, destroy the negotiability of the instrument? and, *second*, if not, can such stipulation be enforced against an indorser? Upon these questions the authorities are in hopeless and irreconcilable conflict. There is one line of cases which sustains the validity of the stipulation and negotiable character of the note; another, which denies the validity of the stipulation, thereby affirming the negotiability of the note; and still another, which seems to sustain the the stipulation, but denies the negotiability of the instrument.

In *Peyser v. Cole*, 11 Or. 39 (50 Am. Rep. 451; 4 Pac. Rep. 520), it was held by this court that such a stipulation is valid, and will be enforced, and this has become the settled law of this State, so that the only remaining question open for inquiry is whether we shall follow the authorities

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sustaining such stipulation and the negotiability of the note, or the other class, which, while sustaining the stipulation, denies the negotiability of the instrument. The authorities on both of these questions will be found fully collated and discussed in 1 Daniel, Negotiable Instruments (4th Ed.), section 62 and note, and 16 American Law Review, 849, to which reference may be had by those desiring to investigate the subject. It has been so often and ably treated in all its various aspects that nothing original remains to be said thereon, and we shall attempt no extended citation or review of the authorities. A careful examination has satisfied us that the weight of authority, and especially of the more recent decisions, is strongly in favor of the doctrine that the negotiability of a promissory note is in no way affected by a stipulation for a reasonable attorney's fee. This is the doctrine in the states of Arkansas, Dakota, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, and Texas, and also in the general trend of the decisions in the federal courts: *Trader v. Chidester*, 41 Ark. 242 (48 Am. Rep. 38); *Farmers' National Bank v. Rasmussen*, 1 Dak. 60; 46 N. W. Rep. 574; *Nickerson v. Sheldon*, 33 Ill. 373 (85 Am. Dec. 280); *Smith v. Muncie National Bank*, 29 Ind. 158; *Stoneman v. Pyle*, 35 Ind. 103 (9 Am. Rep. 637); *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433 (26 Am. Rep. 779); *Dietrich v. Bayhi*, 23 La. An. 767; *Bank of Commerce v. Fuqua*, 11 Mont. 285 (28 Pac. Rep. 291; 28 Am. St. Rep. 461; 4 L. R. A. 588); *Heard v. Dubuque Co. Bank*, 8 Neb. 10 (30 Am. Rep. 811); *Washington v. Denton Bank*, 64 Tex. 4; *Wilson Sewing Machine Co. v. Moreno*, 6 Saw. 35 (7 Fed. Rep. 806); *Adams v. Addington*, 16 Fed. Rep. 89; *American Mfg. Co. v. Dowling*, 17 Fed. Rep. 660; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. Rep. 191 (3 C. C. A. 1; 17 L. R. A. 595); *Howenstein v. Barnes*, 5 Dill. 482; *Schlesinger v. Arline*, 31 Fed. Rep. 648. The contrary decisions in Missouri, Minnesota,

North Carolina, and Pennsylvania, it would be useless to consider or attempt to distinguish.

From the position that a stipulation for a reasonable attorney's fee in no way impairs the negotiability of a note, it would seem logically and necessarily to follow that the indorser of such a note is just as liable for the attorney's fee as for the principal of the note. An indorser, by his contract of indorsement, promises, among other things, that he will discharge the note according to its tenor, upon due presentment and notice. "It is a fresh, substantial contract," says Mr. Daniels, "embodying all the terms of the instrument indorsed, in itself": 1 Daniel, Negotiable Instruments, § 669. And in *Van Fleet v. Sledge*, 45 Fed. Rep. 753, Mr. Justice JACKSON, now of the supreme court of the United States, says: "The legal undertaking of the indorser is that he will pay the note if the maker fails to do so at maturity, upon proper demand made, and notice of such failure given, when not waived. When he passes the title to the paper to an endorsee for value with this undertaking, the sounder view seems to be that the indorser renders himself liable for the face of the note or bill." Again, in *Bank of British North America v. Ellis*, 2 Fed. Rep. 44, in discussing the question now before us, Mr. Justice DEADY uses the following language: "While there is a conflict in the authorities upon the question of whether an instrument, otherwise negotiable, that contains a stipulation for the payment of an attorney fee, is thus negotiable or not, no case has been cited which holds that such stipulation does not pass with the instrument, in case the same is deemed negotiable. * * * The maker of these notes having agreed to pay an attorney fee to the holder thereof, if the same were not paid without action, in my judgment, each subsequent party thereto assumed a like responsibility to such holders, and therefore the plaintiff is entitled to recover such fee from the defendants in this case."

Points decided.

It follows from these conclusions that the judgment of the court below must be REVERSED and the cause remanded for further proceedings not inconsistent with this opinion.

[Argued March 27, 1893; decided April 10, 1893.]

ALDRICH v. ANCHOR COAL CO.

[8. C. 32 Pac. Rep. 756.]

1. JURISDICTION OF STATE COURTS OVER FOREIGN CORPORATIONS.—The rules of the common law regarding service on foreign corporations have been much relaxed until it is now generally held that where a corporation is permitted, either by express enactment or by acquiescence, to do business in a state other than the one in which it was created, it is subject to the jurisdiction of the courts of such other state as to all matters founded upon contracts made, or causes of action arising, in such other state, and service may be made upon it in the same manner as upon a domestic corporation, where the law does not provide otherwise; but where a foreign corporation is not engaged in business in such other state, and has neither an agency nor property therein, service of process upon an agent or officer of the corporation who resides in another jurisdiction, and is only casually within the state, will not confer jurisdiction, unless there is a special statute authorizing such service, it being considered that the official character of such officer or agent does not accompany him beyond the limits of the state in which the corporation was created.
2. JURISDICTION OVER FOREIGN CORPORATIONS—CODE, § 516.—Service of summons within this state on an officer of a foreign corporation who happens to be casually here does not confer on the courts of Oregon jurisdiction over such corporation, since section 576, Hill's Code, provides that no foreign corporation "shall be subject to the jurisdiction of a court of this state, unless it shall appear or have an agency established therein for the transaction of some portion of its business, or have property therein," and making a contract in Oregon to be performed elsewhere, and negotiating in this state a sale of the corporate property is not transacting corporate business within the meaning of the statute.
3. JURISDICTION TO ENFORCE LIABILITY OF STOCKHOLDERS CREATED BY LAWS OF ANOTHER STATE—CONFLICT OF LAWS.—When a statute creates a new right and liability against a stockholder in a corporation, but prescribes a peculiar remedy for its enforcement, the creditor is sometimes unable to enforce his rights in any other state than that where the corporation exists, because no other forum can enforce the peculiar remedy; but when the statute simply creates the liability, leaving the creditor to select any common-law remedy that he may consider appropriate, the rights so given may be enforced by a common-law action in any court having jurisdiction of the subject matter and the parties.

24	32
28	257

24	32
31	467

24	32
40	103

24	32
43	461

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4. **IDEM—EQUITY.**—The liability of a stockholder in an Oregon corporation to the creditors thereof can be enforced only in equity (*Ladd v. Cartwright*, 7 Or. 329; *Hodge v. Silver Hill Mining Co.* 9 Or. 200; and *Brundage v. Monumental Mining Co.* 12 Or. 322, cited and approved); but the legal statutory liability of a stockholder in a foreign corporation, which is, by the law of the state where it is created, a contract enforceable at law may be enforced in Oregon like any other liability arising on a contract made in another state.

Multnomah County: E. D. SHATTUCK, Judge.

This action was brought by E. M. Aldrich and W. S. Dillon, partners, against The Anchor Coal & Development Company, a California corporation, and B. E. Loomis, one of its stockholders, in the Circuit Court of Multnomah County, to recover the sum of two thousand four hundred and two dollars and seventy-two cents upon a contract for work and labor performed for the corporation in building a railway in the state of Washington. The complaint, after alleging a cause of action against the defendant corporation, avers, in order to charge the defendant Loomis individually, that he is a stockholder of such corporation, and the statute of California, under which it was organized, provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each; and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each in conformity therewith." The summons for the commencement of the action was served upon the defendant Loomis personally (he was temporarily within the state of Oregon), and also upon him as vice-president and general manager of the defend-

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ant corporation. Loomis demurred to the complaint on the ground that the court had no jurisdiction, and that the complaint did not state a cause of action against him; while the defendant corporation appeared specially, and moved to set aside the service upon it on the ground that it was unauthorized and ineffectual for any purpose. Both the demurrer and motion were sustained by the court below, and the complaint and action dismissed, from which plaintiffs appeal.

Reversed as to Loomis, and affirmed as to the corporation.

Milton W. Smith (*Walter S. Perry*, counsel), for Appellants.

Edward B. Watson (*Jas. F. Watson*, and *Ben B. Beekman*, counsel), for Respondents.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The first question for our consideration is whether the service upon the general manager of the defendant corporation in the state of Oregon gave the court jurisdiction of the corporation. It appears, from the affidavits in support of and against the motion to vacate the service, that the defendant, being a corporation organized and existing under the laws of California, with its principal office in the city of Oakland in that state, transacted no corporate business, had no property within this state, and had no agency for the transaction of any portion of its business therein, but that at the time its general manager was served he was temporarily within the state for the purpose of negotiating a sale of the stock and plant of the defendant company in the state of Washington to residents of Oregon, and that the contract under which the work was done by plaintiffs in Washington was made and entered into within this state. The claim is therefore made that under these facts the service upon Loomis

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could not bind the defendant corporation, or give the courts of this state jurisdiction of it. By the common law, process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty by whose laws it exists, and any authority for proceeding against it in any other manner must be conferred by statute of the state where process is served: *Moulin v. Insurance Co.* 24 N. J. Law, 222; *McQueen v. Middletown Mfg. Co.* 16 Johns. 5. The inconvenience and often manifest injustice of exempting a corporation from being sued in a state other than that in which it was created has caused the rule in modern times to be very much relaxed, and it is now generally held that where a corporation created in one jurisdiction is permitted, either by express enactment or by acquiescence, to do business in another, it is to be deemed a resident, and subject to the jurisdiction of the courts of the latter in all matters founded upon contracts made, or causes of action arising there, and service may be made upon it in the same manner as a domestic corporation, where the law does not provide otherwise: 2 Morawetz, Corporations, 980; *Miller v. Eastern Or. Mining Co.* 45 Fed. 345; *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. Rep. 354). But where a foreign corporation is not engaged in business in the state, and has neither an agency nor property therein, there is no way of reaching it with process, and service upon an officer or agent of the corporation residing in another jurisdiction, and only casually in the state, will not, in the absence of a statute authorizing such service, confer jurisdiction, it being deemed that his official character does not accompany him beyond the jurisdiction in which the corporation was created: *Moulin v. Insurance Co.* 24 N. J. Law, 234; *McQueen v. Middletown Mfg. Co.* 16 Johns. 5; *Peckham v. Haverhill Parish*, 16 Pick. 286; *Newell v. Great Western Ry. Co.* 19 Mich. 345; *Latimer v. Union Pac. Ry. Co.* 43 Mo. 105 (97 Am. Dec. 378); *State v. Dist. Court*

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Ramsey Co. 26 Minn. 234 (2 N. W. Rep. 698); *Midland Ry. Co. v. McDermid*, 91 Ill. 170; *Phillips v. Burlington Library Co.* (Pa.), 21 Atl. Rep. 640; *Clews v. Woodstock Iron Co.* 44 Fed. Rep. 31 (141 Pa. St. 462; 23 Am. St. Rep. 304).

2. This state permits foreign corporations to transact business within her limits, and, either by express enactment,—as in case of certain corporations,—or by her acquiescence, they are as free to engage in legitimate business as corporations of her own creation. There is no statute expressly providing for service of process upon them, except in the case of certain named corporations not material to be noted in this connection; but it is expressly provided by section 516, Hill's Code, that "no corporation is subject to the jurisdiction of a court of this state unless it appear in the court, or have been created by or under the laws of this state, or have an agency established therein for the transaction of some portion of its business, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached." From the provisions of this section it seems clear that when service is made within the state upon the agent of a foreign corporation it is essential, in order to give the court jurisdiction to render a personal judgment, that it should appear somewhere in the record that the corporation has an agent in the state, conducting some portion of the business for which it was organized. It proceeds upon the theory that when a foreign corporation, availing itself of the rule of comity, carries on its business, or any portion thereof, in this state, it shall be treated and held to be found here, also, to respond to its obligation when called upon to do so in the courts of the state. But it is quite clear that the mere making of a contract in this state with plaintiffs, to be performed in Washington, in the absence of a more definite statement as to the nature and terms of the contract, and the fact that Loomis, at the time of service upon him, was tem-

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porarily within the state for the purpose of negotiating a sale of the property of the defendant corporation, was not an invoking of the comity of the state by the corporation for the exercise of its franchise or the transaction of any portion of the business for which it was organized, and did not, under the statute, give the court jurisdiction; and hence there was no error in sustaining the motion to vacate the service upon Loomis: *Good Hope Co. v. Railway Barb. Fencing Co.* 22 Fed. Rep. 635.

3. The remaining question is whether an action at law can be maintained in this state to enforce a stockholder's liability created by the laws of California. By the statute of that state each stockholder in a corporation is made personally and individually liable for such proportion of each debt or claim against the corporation as the amount of his stock bears to the whole subscribed capital stock, and any creditor can maintain a several action against him for such proportion of his claim: Deering's Civil Code, § 322. This statute has repeatedly been before the courts of that state for interpretation, and the construction uniformly put upon it has been that the liability of a stockholder for the corporate debts is primary and original, and in no way dependent or contingent upon a recovery against the corporation, and that proceedings in behalf of a creditor to enforce such liability may be had in an ordinary action at law: *Mokelumne Canal Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Morrow v. Superior Court*, 64 Cal. 383 (1 Pac. Rep. 354); *Borland v. Haven*, 37 Fed. Rep. 394. It will thus be seen that the liability of a stockholder in a California corporation is, by the statute and decisions of that state, a liability in the nature of a contract, the same in legal effect as if he had separately and directly contracted with a creditor to pay such proportion of his claim as the amount of his stock bears to the whole subscribed

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capital stock, and is enforceable by an action at law in the same manner, and we cannot see why it may not be so enforced in this state. The statute indeed creates a new right and liability not existing at common law, but does not prescribe a peculiar remedy for its enforcement; it only declares that it may be enforced by action, leaving the creditor to select such common-law remedies as may be in use in the jurisdiction where the suit is brought to enforce such liability. When a statute not only creates a new right and liability against a stockholder, but prescribes a peculiar remedy for its enforcement, such remedy is sometimes held to be exclusive, and often cannot be enforced in another state by the employment of the remedies, and according to the course of procedure, provided by its laws. In such case it would seem the creditor can enforce the stockholder's liability only in the state where the corporation exists (*Cook, Stocks and Stockholders*, § 219; *Nimick v. Mingo Iron Works*, 25 W. Va. 184); not, however, because the liability is not recognized as valid and binding, but because the forum where it is sought to be enforced is incapable of administering the peculiar remedy provided for its enforcement. Where a liability, however, is created by statute, without making the procedure for its enforcement, as it were, a part of the liability, we cannot see why it should not be enforced in any court having jurisdiction of the subject matter and parties. There is no difference between a statutory and a common-law right or liability in this regard. The nature of the remedy or the jurisdiction of the court to enforce it does not in any manner depend on the question whether it is the one or the other. "Whenever," says Mr. Justice MILLER, "by either the common law, or the statute law of the state, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties": *Dennick v. Rail-*

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road Co. 103 U. S. 18. And, in general, a creditor of a corporation whose shareholders are by a statute made personally liable in the nature of a contract for its debts may maintain a suit or action to enforce this liability in any court capable of administering the proper relief, whenever he can obtain jurisdiction over the parties, if it is not opposed to the legislation or public policy of the state in which it is sought to be enforced: Thompson on Liab. of Stock. § 8; *Flash v. Conn.* 109 U. S. 371 (3 Sup. Ct. Rep. 213; 16 Fla. 428); Aultman's Appeal, 98 Pa. 505; *Ex parte Van Riper*, 20 Wend. 614.

It is insisted, however, by counsel for defendant that because the rule prevails in this state that the liability of a stockholder to the creditors of a domestic corporation can be enforced only in equity; resort must be had to the same forum to enforce the personal statutory liability of a stockholder in a foreign corporation. We are unable to concur in this view; the liability of a stockholder in this state is upon his obligation to contribute to the capital stock, which is regarded as a trust fund to be held by the corporation for the benefit of its creditors. He is not personally liable to the creditors, except through the corporation, and the creditor is not given, either by the constitution or statute, any remedy against the stockholder, except to require him, in case of the insolvency of the corporation, to contribute for the benefit of the creditors the amount of his unpaid subscription, hence his remedy to enforce this liability is in equity, where the rights of the corporation, the stockholders and creditors can be adjusted in one suit: *Ladd v. Cartwright*, 7 Or. 329; *Hodge v. Silver Hill Mining Co.* 9 Or. 200; *Brundage v. Monumental Mining Co.* 12 Or. 322 (7 Pac. Rep. 314); *Patterson v. Lynde*, 106 U. S. 519 (1 Sup. Ct. Rep. 432). But the liability sought to be enforced in this action is, by the statutes and decisions of California, a legal liability in the nature of a contract in favor of the creditor and against the stockholder, enforce-

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able in an ordinary action at law, and there is no sufficient reason why it may not be enforced in the courts of this state the same as any other legal liability arising on contract made in another state.

For the reasons suggested, the judgment of the court below will be affirmed as to the defendant corporation, and reversed and remanded for further proceedings not inconsistent with this opinion as to defendant Loomis.

[Argued March 22, 1893; decided April 11, 1893.]

WILLAMETTE MILLS CO. v. SHEA.

[S. C. 32 Pac. Rep. 759.]

MECHANICS' LIEN — NOTICE COVERING SEVERAL BUILDINGS AND LOTS — HILL'S CODE, §§ 3669, 3670, 3673.—One who, under a single contract for a stipulated sum, has performed work on, or has furnished material which was indiscriminately used in, the construction of several houses situated on adjoining lots, owned by one person, is entitled to a lien on all the houses and lots jointly, and may include them all in one notice. This is as true where each house is separate from the others, as where they are all under one roof, the test being the entirety of contract.*

Multnomah County: LOYAL B. STEARNS, Judge.

Suit in equity by the Willamette Steam Mills, a private corporation, against John F. Shea, the owner of certain lots in the City of Portland, against D. C. McDonald, the contractor for the erection of four houses on said lots, and against Dayton, Hall & Avery, who furnished to McDonald the builders' hardware used in the houses, for the foreclosure of a lien for lumber furnished to, and used by McDonald, generally in carrying out his contract.

The cause having been referred to Wm. T. Muir, Esq., he advised that the plaintiff and the Dayton firm were

* NOTE.—The right to file a single mechanics' lien against several buildings is the subject of a note fully collating the authorities appended to the case of *Wilcox v. Woodruff* (Conn.), 17 L. R. A. 315. The Connecticut case denied the right, although, as is shown in the note, the decisions generally have upheld it within certain limits.—REPORTER.

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each entitled to a lien on all the houses and lots for the material furnished, and that one notice of lien by each claimant was sufficient to cover the entire property. A decree having been entered accordingly, Shea appeals. Affirmed.

Gilbert J. McGinn (*Cecil H. Bauer* on the brief), for Appellant.

Geo. G. Gammans, for Respondent Dayton.

Joseph Simon (*Oyrus Dolph* and *Rufus Mallory* on the brief), for Respondent Willamette Mills.

MR. CHIEF JUSTICE LORD delivered the opinion of the court.

This is a suit brought by the plaintiff, The Willamette Steam Mills Lumbering & Manufacturing Company, against D. C. McDonald, J. F. Shea, and Dayton, Hall & Avery, as defendants, to foreclose a mechanics' lien upon lot number eight, and the north half of lot number five, in Couch's Addition to the City of Portland, the same being contiguous lots, constituting one entire tract. The facts, as found by the referee, substantially are, that the defendant J. F. Shea, being the owner of said premises, entered into a contract with the defendant D. C. McDonald, by the terms of which the said McDonald agreed, for a stipulated sum or price, to furnish the material and perform the carpenter work in the erection thereon of four separate dwelling houses. The defendant McDonald entered into a contract with the plaintiff for the lumber necessary for the building of said houses, and made a contract with the defendant firm of Dayton, Hall & Avery for the hardware required for the same. The plaintiff furnished the lumber and building material which were used in the construction of the said four houses, and upon which there was due, at the time of the commencement of this suit, the sum of seven hundred and seventy-seven

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dollars and seventy-seven cents, and the defendants Dayton, Hall & Avery furnished the hardware which was used in the construction of the same, and upon which there was due at the time of the commencement of this suit the sum of one hundred and eighty-three dollars and twenty-seven cents. The building material and hardware which the defendant and Dayton, Hall & Avery furnished to D. C. McDonald were not furnished in separate quantities, but as a whole, for the several houses, to be used indiscriminately. Thereafter liens were duly and severally filed by the plaintiff and Dayton, Hall & Avery against said houses and lots as a whole.

Upon this state of facts the contention for the appellant is that a separate notice of lien should have been filed against each house to acquire a valid lien, or, in other words, that the including of four dwelling houses in one notice of lien was void. This is predicated upon the principle that our statute by its terms contemplates only a separate lien on a single building, and not a joint lien on several buildings. The language of the statute is: "Section 3669. Every mechanic * * * or other person performing labor or furnishing materials * * * to be used in the construction of any building * * * shall have a lien upon the same," etc. "Section 3670. The land upon which any building * * * shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof shall also be subject to the liens created by this act," etc. "Section 3673. It shall be the duty * * * of every mechanic * * * or other person, within thirty days after the completion, * * * to file with the county clerk of the county in which such building shall be situated a claim containing a true statement of his demand," etc. As the words "building" and "land" are used in the singular, it is insisted that the lien given by the statute attaches only to the particular building

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upon which the labor was performed, or for which the materials were furnished, and to so much of the "land" as may be required for the convenient use and occupation of such building; and, as a consequence, that the notice of lien, required to be given by the statute in order to acquire a valid lien, must be confined to the particular building, and the land on which it is situated, and may not include work done and materials furnished for another building upon any other land. In *Hill v. Braden*, 54 Ind. 77, the statute under consideration provided that "mechanics and all persons performing labor or furnishing materials for the construction or repair of any building may have a lien," and the court says: "Our mechanics' lien law by its terms contemplates only a separate lien on a single building, not a joint lien on several buildings." And again: "So far as the lien is given upon the lot or land, it is only as an incident to the lien upon the house on the lot or land, for the materials in the house; the house and lot on which it stands, the curtilage, constituting one parcel of real estate. As the mechanics' lien act contemplates only liens on separate pieces of property, so it contemplates only a notice of intention to hold a lien on a separate piece of property, including, of course, its appurtenances." This view of the statute is approved in *Wilkinson v. Rust*, 57 Ind. 172, and in *McGrew v. McCarty*, 78 Ind. 497. It proceeds upon the theory that the lien is specific,—that is, that it is confined to a particular building or structure upon which the labor was done, or for which the materials were furnished: Jones on Liens, § 1310. Mr. Phillips states the reason to be that "if the work be done or materials furnished upon distinct premises, the lien must be against each of the several premises according to the value of the work and materials incorporated in each, and not against both for the aggregate amount. The reason a joint claim may be sustained against several houses put up at the same time, without

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an interval between them, is that they may be considered as one building, and consequently as an integer or unit which may be covered by one claim. But this cannot be asserted with any truth where there is an interval, however small, which prevents the whole from being one continuous structure. It has accordingly been held that a joint claim against separate blocks of houses in different streets is a nullity, and the same principle applies to different blocks on different sides, or on the same side, of the same street, and in every instance where the residence against which the claim is filed is not substantially one building": Phillips on Mechanics' Liens, § 376.

There is still another reason given in support of this rule or theory. In *McGrew v. McCarty*, 78 Ind. 498, ELLIOTT, C. J., says: "The theory of the law is that credit is given to the identical building for which the materials are furnished, or upon which the work is done. Each building represents a distinct or separate security; one building cannot be made to stand as the security for another. In truth, each building stands as a several debtor, and one can no more be made to discharge the debt of another building than one individual debtor can be made to pay a separate claim owing by somebody else to the same creditor. It is upon this principle that those cases may be sustained which hold that a joint claim cannot be supported by the proof of a separate right." As sustaining this view, see *Gorgas v. Douglas*, 6 Serg. & R. 512; *Fitzpatrick v. Thomas*, 61 Mo. 512; *Chapin v. Paper Works*, 30 Conn. 461 (79 Am. Dec. 263); *Steigleman v. McBride*, 17 Ill. 300; *Landers v. Dexter*, 106 Mass. 531; *Barker v. Maxwell*, 8 Watts, 478; *Simmons v. Carrier*, 60 Mo. 581.

But it is observable under these statutes in which the word "building" is used in the singular, and which, by reason thereof, have been construed in some jurisdictions to confine the lien to a single building, or to authorize

only a single lien against each building for which the materials were furnished, or upon which the work was done, that nevertheless such single lien may cover or include the outbuildings, as dependencies and appurtenances to the main building. In *Bank of Charleston v. Curtiss*, 18 Conn. 342 (46 Am. Dec. 325), a single lien was filed for work upon a dwelling house and barn and one acre of land, and it was held that the lien was valid. The theory is that the barn and other outbuildings connected with the dwelling house form one homestead. The outbuildings being dependencies, or appurtenant to the dwelling house, they were erected for a connected use, relatively as much so as the different apartments of a dwelling house, which entitles them to be considered as one structure forming one homestead. So, too, where a solid block of buildings, consisting of distinct but connected houses, and covering several lots, has been erected by the same owner at the same time, a single lien covering the whole improvement has been held valid on the ground that the entire structure was but one building. In *Brabazon v. Allen*, 41 Conn. 361, it was held that where a block of buildings comprising several dwelling houses, separated from one another by a partition wall, is erected upon a single lot, and work is done upon it as a whole under one entire contract, the builder's lien extends as a single lien to the whole block. FOSTER, J., said: "The plaintiffs in error insist that here are five dwelling houses, which, though contiguous to each other, are still in point of fact separate, distinct, and independent, as much so in contemplation of law, as if each stood on a lot by itself." But to this argument he answered: "We think that the plaintiffs are entitled to a lien on the building on which they had labored, and for which they had furnished materials, and on the whole building, and the land on which it stands."

It will be seen, therefore, while the plaintiffs in error

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claimed that there were five dwelling houses within the intent and meaning of the statute providing for a lien against "every dwelling house or other building," the court thought and held that, within such meaning and intent, where the materials were furnished for, and the work was done on the structure as a whole, under one entire contract, there was but one building, although when completed it made five dwelling houses, separated one from another by a partition wall. We have been cited to these adjudications under statutes similar to our own as supporting the decisions of this court, and as throwing light upon the subject under discussion. The decisions of this court referred to are *The Dalles Lumber Co. v. Woolen Mfg. Co.* 3 Or. 527, and *Kezartee v. Marks*, 15 Or. 529 (16 Pac. Rep. 407). At the time the first case was decided the statute provided "that any person who shall hereafter, by virtue of any contract with the owner of any building, * * * perform any labor or furnish any material for the construction or repair of such building shall, upon filing the notice prescribed, have a lien upon such building." The controversy in the case was between a mortgagee of the woolen manufactory and the plaintiff, who claimed a lien for labor and material furnished in the construction of the factory, dye house, bleach house, and dry house. The case was decided upon the sufficiency of the facts stated in the complaint, the court holding that it was *ultra vires* for a corporation organized to sell lumber to perform work and labor, and that it did not appear from the complaint how much was for labor nor how much for lumber. The argument for appellant was "that the buildings being separate and apart, the lien is properly on each building for the particular amount of lumber furnished for the same"; and the court expressed the opinion, at page 531, that the statute "confines the lien to the building constructed or repaired. This evidently refers to the particular building upon which the labor was performed, or for the construction or repair

of which the materials were furnished, and to no other." To the claim by the respondent that the dry house, dye house, and bleach house were as necessary to the factory as a mill dam is to a mill, as decided in *Willamette Falls Co. v. Remick*, 1 Or. 170, the court answered: "Whether these outbuildings are as necessary to carry on the business of a factory as a mill dam is to a mill, the court is not advised. There is one thing certain, which appears from the pleadings in this case, that these outbuildings are separate and distinct from the main factory." It is clear, however, if the court had been advised that the outbuildings were used in connection with the factory for a common purpose, and were as necessary to the factory as a mill dam is to a mill, it would not have affected its conclusions, since in view of the facts that these outbuildings were separate from the factory building, and the statute, in its opinion, confined the lien to a single building, there could not be a lien on the factory building and its outbuildings. We think this is doubtful, even though the construction that the statute confines the lien to a single building be correct. A single lien upon separate buildings is allowed when they are erected for any common purpose or connected use, as in the case of barns, stables, and other outhouses used in connection with, and within the curtilage of a dwelling, or where the buildings have been erected for some general and connected use: *Lindsay v. Gunning*, 59 Conn. 296 (22 Atl. Rep. 310); *Willamette Falls Co. v. Remick*, 1 Or. 170. These outbuildings were essential to the use of the factory, and connected with it for a common purpose, and, upon analagous principles, ought to be considered under the statute in the light of all the authorities as a part of the factory or its dependencies.

The case at bar, however, is distinguishable from *The Dalles Lumber Co. v. Woolen Mfg. Co.*, in that it does not appear in the latter case (1) that the materials were furnished under one entire contract; (2) nor that the build-

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ings were situated on the same tract of land, or on contiguous lots. In *Kezartee v. Marks*, 15 Or. 529 (16 Pac. Rep. 407), it was held to be a fatal objection to the lien that it included materials used in the repair of the house, as well as the construction of the fence. This case is also distinguishable from the case at bar in that (1) it does not there appear that the materials were furnished under one entire contract, or even under one contract; (2) nor that there was anything in common between the house and fence, except that they were on the same donation land claim. But while the case at bar is distinguishable from those cases, indicating that the question presented by the record, namely, whether a single lien for materials furnished to, or work done on, several houses as a whole, under an entire contract for a stipulated sum, is valid, has not been directly decided; yet there is no doubt that the trend of these decisions is adverse to its validity. They are predicated upon the idea that the statute contemplates that the lien should be confined to a single building, as indicated by the use of the word "building," and for the reason that credit is only given to such "building" for the materials furnished or the labor done upon it; and, consequently, that a single lien cannot be made to cover several buildings. But certainly too great importance ought not to be attached to the use of the word "building," in view of the fact that a like use of the singular in the statutes of many other states has been no bar to an adverse conclusion. The statutes are set out in Jones on Liens, volume 2, sections 1184, 1133, and the cases to which we shall refer have all been decided under statutes like our own, which use the singular rather than the plural. These cases hold, where the contract is entire, that the lien attaches to the buildings and the land as a whole. They proceed upon the principle that where labor and materials are furnished in the erection of several buildings upon contiguous lots, under an entire contract with the owner,

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the lien attaches to the buildings for all the materials and labor furnished.

In *Wall v. Robinson*, 115 Mass. 429, the contract was for labor performed in the erection of three dwelling houses and one stable upon the same lot, and the contractors were to receive one hundred and forty dollars for each house, and thirty dollars for the stable. The lien was held valid, the court saying: "In the case at bar the petitioners have performed labor upon several buildings situated upon the same lot, under an entire contract, and for an entire price. We think such a case is within the purpose of the statute and the intention of the legislature. The parties by their contract have connected the several buildings, and treated them as one estate. Under the contract the labor performed on each building creates a lien upon the whole lot, and therefore upon all the other buildings. Although it cannot be said with strict accuracy that the labor for which the lien attaches was all performed on each building affected by it, yet it was all performed on one estate, and to deny the lien would defeat the spirit of the statute by a too literal adherence to its letter. * * * We are of opinion that when labor is performed or furnished under an entire contract, in the erection or repair of several buildings owned by the same person, and situated upon the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, if the other conditions of the statutes are fulfilled." To the same effect is *Batchelder v. Rand*, 117 Mass. 176, where ENDICOTT, J., holds that the facts that the land was conveyed in separate lots, and the buildings were separate, one standing on each lot, do not affect the principle upon which *Wall v. Robinson* was decided.

In *Doolittle v. Plenz*, 16 Neb. 153 (20 N. W. Rep. 116), where A. erected three houses for B., one upon each of three adjoining lots, for an entire sum, it was held that the lien attached to all the lots and the buildings thereon.

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In *Laz v. Peterson*, 42 Minn. 221 (44 N. W. Rep. 3), four houses were built separately on the same tract of land, under an entire contract, and it was held that the lien extended to the whole premises as an entirety. MITCHELL, J., said: "But how have the parties to the building contracts treated the property, and not how the owner intends to use it after the completion of the houses, is the question. By contracting for the erection of these four houses under one entire contract, they have connected the two city lots and the several buildings, and treated the whole as one tract or estate. Had the houses been contiguous, so as to form a solid block, according to all the authorities the lien would have extended to the whole property, although consisting of a different city lots according to the plat, and although the different parts of the block were designed to be used separately, and not as appurtenant to each other. But that case would not differ from the present unless we attach special significance to the literal reading of the statute, which uses the words 'house' and 'dwelling' in the singular. This would defeat the spirit of the law by a too strict adherence to its letter": *Glass v. St. Paul Sleigh Co.* 43 Minn. 222 (45 N. W. Rep. 150), follows *Laz v. Peterson*. In *Pennock v. Hoover*, 5 Rawle, 291, the right of a joint lien upon several houses, the property of the same person, was upheld under a statute which provided that "every dwelling house or building shall be subject to the payment of the debts contracted" for building it. This case presents an interesting discussion of the use of the words in the statute, "every dwelling house or other building," as showing that they may include more than one building. To the same effect is *Phillips v. Gilbert*, 101 U. S. 721, where a joint lien was claimed on six houses and lots in the city of Washington, under an act of congress which gave a lien upon complying with certain conditions therein. The validity of the lien was contested on the ground that the claim of lien was void

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because made in gross upon six separate lots, without specifically setting forth the amount claimed upon each lot. The court held there was nothing in this objection, Mr. Justice BRADLEY, saying: "The contract was one, and related to all the buildings as an entirety, and not to the particular buildings separately. The whole row was one building, within the meaning of the law, from having been erected by the parties on one contract, as one general piece of work."

In *Carr v. Hooper*, 48 Kan. 253 (29 Pac. Rep. 398), it was held, where work and material were furnished in the erection of five buildings upon a single lot, under an entire contract with the owner, that the lien attaches to the lot and buildings for all the materials and labor furnished. In *Sargent v. Denby*, 87 Va. 206 (12 S. E. Rep. 402), two houses were built on opposite sides of the street for an entire price, and the lien claimed was on both houses and lots. The defense was that the lien was void because the lien given by the statute is a separate and distinct lien on each building for the amount of the materials actually delivered for construction. The lien was held valid. In *Fullerton v. Leonard*, 52 N. W. Rep. 325, the facts are somewhat similar to the case at bar, except that the two lots upon which the buildings were erected belonged to separate individuals who joined in the contract. A sub-contractor furnished materials to be used in the erection of all the buildings, under an entire contract with the builder. The question was whether a joint lien could be enforced against two separate properties owned by different individuals, based upon a single account of lumber and materials furnished to both upon a joint contract. The court held that the lien could be enforced against all the buildings and the two lots; that the contract was to govern, and that the buildings, having been united in one contract, must be regarded as one piece of work. The court says: "It is true that the several lots or parcels of land were not owned

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by the same person, but we can perceive no distinction in principle between a case where several lots are owned by one person, or where the lots are owned by different owners, as it is not so much the different ownership, as it is the contract upon which the work is to be performed, that is to determine whether the lien must be joint or several. A joint lien upon several buildings situated upon different lots owned by the same persons could not be maintained where a separate contract had been entered into by the owner and contractor; for by the several contract the inference would be that a separate account should be kept with each building. Not so when the contract covered several buildings to be erected for a gross amount without regard to the cost of each. So, if two or more several owners of lots or parcels of land wish to jointly contract for the erection of several buildings, to be situated upon the several pieces for a definite and specific sum in gross for all, without regard to the cost of either one, a joint lien may be asserted upon all for any balance due for the erection of such buildings. The contract with the parties has no reference to the separate ownership, and no inference can be drawn from it that a separate account shall be kept with each building, or each person interested in the contract." It is true that a lien is a creation of the statute, but its foundation is in the contract. If the contract is to control and it treats the property as a whole, there can be no substantial reason why the lien may not cover it. In such case, the contract relates to no particular building, but treats them as a whole, though they are, in point of fact, separate and distinct buildings.

As we have seen there are some authorities which hold that where several houses are built together in one block, under an entire contract, the lien extends as a single lien to the whole block, but that they refuse to so hold when the buildings are separate and distinct. It does not seem to us there is any sound basis for this distinction, for

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the reason that houses so constructed in a block are always treated as separate buildings, and are owned and sold as such, as fully as though wholly disconnected. There is no reason, whether the buildings are comprised in one block, or are in fact separate and distinct from each other, when constructed upon adjoining lots constituting one tract, if the contract is entire and treats them as a whole, why a single lien should not attach, in either case, to the entire land and buildings upon it. There is nothing definite in the statute which indicates the number of buildings that may be covered by a lien. While we have required those who would receive the benefit of the statute to comply with its positive requirements in order to acquire a valid lien, *Gordon v. Deal*, 23 Or. 153 (31 Pac. Rep. 287), *Nicolai Bros. v. Van Fridagh*, 23 Or. 149 (31 Pac. Rep. 288), we think a more liberal rule should prevail as to those parts of the statute less definite, which, to rigorously enforce, would deprive the claimant of its benefits. It can be a matter of no importance to the defendant Shea, who is owner of the entire property, whether he pays the entire debt as a single lien upon all the buildings, or as four separate liens. So far as notice is concerned, the single lien would answer that purpose as well as if they were separate. By the contract the buildings and land are united and treated as one structure. The materials were furnished and used indiscriminately in all the houses,—no separate accounts were kept,—the buildings were carried along together through the several stages of construction—they were situated upon contiguous lots, and belonged to the same owner. If the plaintiffs have no lien against the four houses as a whole, they have no lien at all, for they have furnished no particular materials for any particular house. As a consequence, the estate of the defendant Shea would have the benefit of their materials, and the plaintiffs would be deprived of their lien. If we can fairly avoid it, no such construction ought to be put

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upon our statute as would lead to this result. To uphold the lien does not conflict with the decision in *Kezartee v. Marks*, but only its reasoning. But for the reason suggested, that case may well and rightly stand upon its facts.

The question presented by this record has not hitherto been before this court, in consideration of which, and our own decisions, we have been induced to carefully examine the different adjudications and the reasoning by which they are supported, with the result that under the facts herein the liens attach to the lands and the houses as a whole. It follows that there was no error, and that the decree must be **AFFIRMED**.

[Argued March 28; decided April 17; rehearing denied June 12, 1893.]

PORTLAND CONSTRUCTION CO. v. O'NEIL.

[S. C. 82 Pac. Rep. 764.]

ACCEPTING BENEFIT OF DECREE—WAIVER OF RIGHT TO APPEAL.—When the pleadings admit a specified sum to be due, and the amount is paid into court, it may be accepted by the party entitled thereto without waiving the right to appeal; but if the amount of a judgment or decree in excess of the specified sum be withdrawn from the custody of the clerk, even though the record be not canceled, it operates as an absolute satisfaction, unless the decree is a severable one, and the right to appeal cannot be reinstated by paying the money back to the clerk.

Multnomah County: LOYAL B. STEARNS, Judge.

Suit in equity by the Portland Construction Company, as assignee of Messrs. Wolfe & Callahan, against the Sisters of Charity of Providence, the owners of St. Vincent's Hospital, in Portland; J. R. O'Neil, the contractor for excavating for the foundations of the hospital; and J. S. McElvaine and others who performed work under Wolfe & Callahan, the sub-contractors. There was a decree in plaintiff's favor from which it appealed. Dismissed.

31	54
24	59
32*	764
32*	766
24	54
26	379
32*	764
38*	306
24	54
28	96
29	421
24	54
133	85
24	54
136	204
24	54
37	324
24	54
41	466

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Milton W. Smith (*Walter S. Perry* of counsel), for Appellant.

Raleigh Stott, for the Sisters of Charity.

Thos. N. Strong, for J. R. O'Neil.

Jasper J. Johnson, for McElvaine and other claimants.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit brought by the Portland Construction Company, as assignee of Messrs. Wolfe & Callahan, to foreclose a lien upon the property of the Sisters of Charity for excavating for the foundation of St. Vincent's Hospital, at Portland. The answer of the Sisters of Charity admits that there was due a balance of seven thousand four hundred and forty-two dollars and sixteen cents, which sum they deposited with the clerk, but at the trial, on November 14, 1892, the court found that there was due in addition thereto the sum of one thousand three hundred and seven dollars and ninety-eight cents, and decreed that if this amount was not paid the property should be sold to satisfy the lien. On November 15, 1892, the Sisters of Charity paid into court the amount so found due, and the plaintiff on the next day drew from the clerk the whole amount so tendered and paid, but did not cancel the decree of record. The money was kept until November 19, 1892, when, becoming dissatisfied, it was returned to the clerk, and on December 7, 1892, the plaintiff attempted to appeal from said decree by serving and filing a notice thereof, wherein it sought to recover the sum of three thousand nine hundred and fifty-four dollars and eighty-seven cents; an attorney's fee of one thousand dollars; interest on the whole claim from October 1, 1891; and the costs and disbursements, in addition to the amount so decreed. The Sisters of Charity, on January 7, 1893, filed a motion in the court below for an order requiring

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the clerk to satisfy the decree, which was on January 17, 1893, allowed, and the clerk ordered to satisfy the same as of November 16, 1892, from which order also the plaintiff appeals.

The Sisters of Charity move to dismiss the appeal from the decree of November 14, 1892, and contend that it has been paid and satisfied, while the plaintiff contends that the appeal is from that part of the decree which failed to award the full amount of its claim, and that the acceptance of the fruits of the decree is not a waiver of its right to appeal. Judge ELLIOTT, in his work on Appellate Procedure, § 150, says "It is a general rule that a party who accepts the benefit of a judgment waives the right to prosecute an appeal from it." Mr. Freeman, in his valuable work on Judgments, § 426, says that "Payment will of course operate as a release, if made to the plaintiff or to any person authorized by him to receive it." And the same learned author at section 466, says that "Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement." The deposit of this money with the clerk was not a payment of the decree, and could not operate as a discharge thereof until the plaintiff accepted it. "A tender upon a judgment, if not accepted, does not operate as an extinguishment of the lien": *People v. Beebe*, 1 Barb. 385. It has been repeatedly held that where the pleadings admitted a certain amount due, and such sum had voluntarily been tendered, or paid after judgment, the amount tendered or paid on the judgment may be accepted by the prevailing party without waiving the right to appeal: *Embry v. Palmer*, 107 U. S. 8 (2 Sup. Ct. Rep. 25); *Morris v. Garland*, 78 Va. 215; *Higbie v. Westlake*, 14 N. Y. 288; *Dudman v. Earl*, 49 Iowa, 37; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557 (29 N. W. Rep. 621). The Sisters of Charity having admitted that there was due seven thousand four hundred and forty-two dollars

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and sixteen cents, and having voluntarily tendered this amount, the plaintiff, after judgment, might have accepted the same, because it was a confession of judgment for that amount, and due at all events, and if the money had been allowed to remain with the clerk, the interest thereon would have been lost to the plaintiff.

In *Moore v. Floyd*, 4 Or. 260, this court held that "a party cannot claim the benefit of a judgment, and at the same time appeal from it. The right to proceed on a judgment and enjoy its fruits, and the right of appeal are not concurrent; on the contrary, they are totally inconsistent. An election to take one of these courses was therefore a renunciation of the other." The case of *Lyon v. Bain*, 1 Wash. T. 482, is directly in point. A decree was there rendered awarding a lien upon certain land for the payment of two hundred dollars and costs, which was paid into court in pursuance of the decree. The attorney for the prevailing party drew out the costs and one hundred dollars on account of the decree, which latter sum he subsequently returned to the court, and on these facts the appeal was dismissed. The court, by WINGARD, J., said: "The payment of the money into court was in the nature of a tender. The plaintiff was not bound to take it, but, having done so, his act is a termination of his right to further litigation." The payment of one thousand three hundred and seven dollars and ninety-eight cents was not voluntary, but was coerced by the decree, and, while the plaintiff might have accepted the amount tendered, it could not appropriate this amount which had been allowed over and above the tender and maintain its appeal unless the decree is severable.

In *Shook v. Colohan*, 12 Or. 239 (6 Pac. Rep. 503), this court held "that the trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." In *Inverarity v. Stowell*, 10 Or. 261, the lower court decreed that the building which

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was subject to a mechanics' lien be sold separately from the land, with the right of removal by the purchaser, and the proceeds applied first to the satisfaction of the mechanics' lien. The record also shows that appellant, after the decree, had obtained an order for the issuance of an execution thereon, and the respondents claimed that the right of appeal had been waived. WATSON, C. J., says: "The principle, as we understand it, which the respondents seek to have applied here, is that when the provisions of a judgment or decree are so closely connected and mutually dependent, that a reversal as to one would render necessary the reversal of the others, a party cannot take the benefits of some of such provisions and still retain his right of appeal," and held that the decree for the sale of the property might well stand and be enforced, and yet the portion directing the application of the proceeds be reversed or modified.

In the case at bar, plaintiff cannot have a decree in the court below for more than the amount tendered, and here for an additional sum. The issue there tried was the difference between the sum tendered and the amount claimed, and the appeal, if properly taken, brings up every part of the decree in addition to the tender, and is so closely connected with and mutually dependent upon the amount involved that it would necessitate an examination into the whole question of the amount due in excess of the tender.

The plaintiff having accepted the fruits of the decree the lien thereof was discharged, and there was nothing from which to appeal. The return of the money could not reinstate the decree so as to give this court jurisdiction, and the MOTION TO DISMISS the appeal must be ALLOWED.

Per Curiam.

PORTLAND CONSTRUCTION CO. v. O'NEIL.

Multnomah County: LOYAL B. STEARNS, Judge.

MOORE, J.—This second appeal is from the order of the court directing the clerk to enter satisfaction of the judgment. For the reasons embraced in the foregoing opinion, the decree of the court is affirmed.

KIMBALL v. BLEICK.

[S. C. 32 Pac. Rep. 766.]

REDELIVERY BOND—REAL PARTY IN INTEREST—CODE, § 137.—A delivery bond in replevin may, under Hill's Code, § 137, be given to the sheriff, made payable to the plaintiff, as the real party in interest; and of course suit may be maintained thereon by the plaintiff in his own name under section 27, Hill's Code.

Multnomah County: E. D. SHATTUCK, Judge.

Action by the W. W. Kimball Company, a private corporation, against Theodore W. Bleick as principal, and Meyer and Lynch, as sureties, on a redelivery bond given under the provisions of section 137 of Hill's Code, but made payable to the Kimball Company instead of to the sheriff. Judgment for plaintiff and defendants appeal. Affirmed.

*Dan J. Malarkey, and Guy G. Willis, for Appellants.**John H. Handy, for Respondent.*

PER CURIAM.—This is an action against the principal and his sureties on a redelivery bond given in a replevin suit, pursuant to section 137 of Hill's Code. The defendants Meyer and Lynch interposed a demurrer to the complaint, which the court overruled, and, refusing to further plead, final judgment was rendered against them.

Per Curiam.

The errors assigned are: (1) That the undertaking is void because it runs to the sheriff instead of the plaintiff, and therefore no action can be maintained upon it; and (2) that if it is good the complaint is defective, because the action is brought in the name of the wrong person. Under section 137 of Hill's Code, an undertaking may be given to the sheriff, made payable to the plaintiff, who is the real party in interest and for whose benefit the undertaking is taken. The undertaking, then, being sufficiently in compliance with the statute, an action may be maintained upon it, and the plaintiff, being the real party in interest, is the proper party to prosecute.

The judgment is **AFFIRMED**.

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[Decided April 19, 1893.]

HENDY MACHINE WORKS v. PORTLAND SAVINGS BANK.

[S. C. 32 Pac. Rep. 1036.]

APPEAL — ANSWER — CODE, § 536.—An appeal may be taken from a decree rendered against a defendant standing on his demurrer and refusing to answer or plead further after it is overruled, at any time within six months from the date thereof. *Kearns v. Follansby*, 15 Or. 598, approved and followed.

Multnomah County: **LOYAL B. STEARNS**, Judge.

This is a motion to dismiss an appeal from a decree entered in favor of plaintiff on a demurrer to the complaint.

Thomas N. Strong, for Appellant.

Milton W. Smith (*Walter S. Perry* of counsel), for Respondent.

PER CURIAM.—Where a demurrer to a complaint is overruled, and the defendant, standing on his demurrer,

Points decided.

refuses to answer or plead further, and a decree is entered against him at a subsequent day of the term, an appeal may be taken from such decree at any time within six months after its rendition: *Kearns v. Follansby*, 15 Or. 596 (16 Pac. Rep. 478).

Motion OVERRULED.

[Decided April 19, 1893.]

STATE v. FOOT YOU.

[S. C. 32 Pac. Rep. 1031; 33 Pac. Rep. 537.]

1. **HOMICIDE—DYING DECLARATIONS—EVIDENCE.**—On a trial for murder, declarations of the deceased as to the cause of his injury and the identity of the party who inflicted the fatal wound, shown to have been made under a sense of impending death, are admissible in evidence, although testified to in Chinese and translated into English by a sworn interpreter.
2. **COMPETENCY AND CREDIBILITY OF DYING DECLARATIONS.**—The competency of dying declarations is for the court; but, after they have been admitted, their weight and credibility are questions of fact for the jury. The facts that declarations made by the victim of a murder under sense of impending death, were the result of questions propounded by an attorney, the absence of cross-examination, the use of an interpreter, the presence of friends and prosecuting officers only, and that accused was unrepresented by counsel, are matters affecting merely the weight and credibility, and not the competency, of such declarations.
3. **CRIMINAL EVIDENCE.**—A conviction of murder will not be reversed because a pistol not connected with defendant was introduced in evidence, where it was admitted only on the understanding that it should be so connected, and was withdrawn from the jury on failure of the state to show such connection.
4. **APPEAL—ERROR—BILL OF EXCEPTIONS.**—It is an invariable rule in Oregon that no objection to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal unless there was an objection, a ruling thereon, and an exception, all properly incorporated into a bill of exceptions. *O'Kelly v. Territory*, 1 Or. 59; *State v. Abrams*, 11 Or. 172, approved and followed.
5. **APPEAL—ERROR—PRACTICE.**—The fact that the whole record of the trial is before the appellate court upon some particular assignment of error, does not authorize the court to examine such record to see whether any other errors or irregularities than those noted in the conduct of the trial can be found, which, if properly excepted to, would justify a reversal. *State v. Cody*, 18 Or. 506, overruled on this point.

24	61
333	128
24	61
133	159
24	61
196	280
36	520
24	61
87	89
88	59
24	61
39	81
39	96
39	488
24	61
41	113
41	300
41	506
24	61
42	212
24	61
45	353
24	61
147	373
147	490

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6. **MOTION FOR NEW TRIAL—DISCRETION OF COURT.**—A motion to set aside a verdict, or to grant a new trial, because of insufficiency of the evidence, in both civil and criminal cases, is addressed to the sound discretion of the trial court, and its ruling thereon cannot be assigned as error on appeal. *State v. Mackey*, 12 Or. 154; *State v. Clemmens*, 15 Or. 237; *Beekman v. Hamlin*, 23 Or. 313, approved and followed; *State v. Olds*, 19 Or. 397, overruled on this point.
7. **VERDICT—WEIGHT OF TESTIMONY.**—The credibility of witnesses and the weight to be given to testimony are matters for the consideration of the jury, and when a verdict has been approved by the trial court, the appellate court will not review it merely on the weight of the testimony.
8. **COMPETENCY OF DYING DECLARATIONS.**—The test to be applied to dying declarations to determine their admissibility is whether the deceased, if living, would have been permitted to testify to the things contained in the declarations.
9. **DYING DECLARATIONS—OPINION EVIDENCE.**—A statement of a person shot, that he caught a glimpse, as he fell, of the person that shot him, and thinks he would know him if he saw him, followed by a statement on the following day, when the defendant was presented to him for identification, that he fully recognizes him as the one who shot him,—is not the expression of an opinion, and is admissible as a dying declaration.

Multnomah County: J. COREY FULLERTON, Judge.

Rufus Mallory (Cyrus A. Dolph, Chas. B. Bellinger, and Joseph Simon on the brief), for Appellant.

George E. Chamberlain, attorney-general, Wilson T. Hume, district attorney, and Alfred F. Sears (Henry E. McGinn, and Nathan D. Simon on the brief), for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court.

This is an appeal from a judgment of conviction of murder in the second degree, on an indictment charging the defendant with the crime of murder in the first degree, in shooting and killing one Ching Bo Qung on the thirteenth of April, 1892. The homicide occurred in a Chinese saloon in the city of Portland known as the "Temperance Saloon," in the back room of which was being conducted at the time a Chinese gambling game called "tan tan." That Ching Bo Qung was shot at the

time and place mentioned, and that he afterwards died of the wound then inflicted, was not disputed at the trial, but the principal controversy was as to whether defendant did the shooting. The claim for the state was that the deceased went to this saloon for the purpose of collecting some money he claimed to be due him on a lottery ticket, and, passing into the "tan" room, demanded the money of the defendant, who was conducting the game, but defendant refused to pay it, whereupon deceased said he would have the defendant arrested, or the house "pulled" if he did not pay, and turned to go out; that just as he reached the front door, defendant, who had followed, fired two shots at him, one of which took effect in the back, inflicting a wound of which he died in a short time. The defendant claimed that he was not present at the time of, and did not do, the shooting, but that it was done by one Lou Choy, who was in charge of the game, to prevent the deceased from stealing and carrying away money that did not belong to him; that at the time of the shooting the "tan" game was being conducted by Lou Choy and two other Chinamen, and there were three bags of money and some loose change upon the table; that while the game was being played the deceased entered the "tan" room, accompanied by three or four Chinamen, one of whom presented a pistol at the men in charge of the game, while the others rushed to the table and grabbed for the money, and deceased succeeded in getting one sack, which he started to carry away, when he was followed and shot by Lou Choy.

1. On the trial, to maintain the issues on the part of the state, the district attorney offered in evidence two statements written by Mr. Nate Simon, and signed by the deceased, purporting to be dying declarations by him of the circumstances attending the crime, and the identity of the person by whom it was committed. Before offering these papers, the state called witnesses who were present at

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the time they were prepared and signed, who testified that the deceased, at the time the papers were signed by him, was under a sense of impending death, and had no hope of recovery; that the statements were made in Chinese, translated into English by a Chinese interpreter, reduced to writing by Mr. Simon, an attorney employed to assist in the prosecution, and then read and translated back to the deceased, who said they were correct, and signed them. The statements were then admitted in evidence, and read to the jury, against the objection and exception of the defendant. In view of the testimony, and the statements aforesaid, it can hardly be claimed that they were not made under a sense of impending death, and were incompetent on that account; but the contention for appellant seems to be that the circumstances under which they were made were such as to render them so completely unreliable as to be incompetent as evidence. It appears from the testimony that two or three days after the shooting, Mr. Lafferty, assistant district attorney, and Mr. Simon, special counsel employed to assist in the prosecution, accompanied by a Chinese interpreter, visited the deceased at the hospital where he had been taken for treatment, for the purpose of obtaining a statement from him; that in reply to questions propounded to him by Mr. Simon, through the interpreter, the deceased made a statement of the circumstances of the shooting and the identity of the party, which was translated into English by the interpreter, and reduced to writing by Mr. Simon, and then read by Mr. Simon to the interpreter, and by him translated in Chinese to the deceased, who said it was correct, and signed it. In this statement the deceased said he only caught a glimpse of the man who shot him, but thought he would be able to identify him. The following day the defendant was taken to the hospital for identification, and, in the presence of the same parties as on the previous day, and of the defendant, the deceased made and signed another statement,

in the same manner as the first, in which he said that he recognized the defendant as the person who was conducting the game at the time he went into the "tan" room, and who followed him and shot him in the back as he was about to pass through the front door. The person who acted as interpreter at the time both these declarations were made, was called as a witness on the trial, and testified that he correctly interpreted the questions propounded by Mr. Simon, and the answers of the deceased thereto, and also translated the statements, as reduced to writing by Mr. Simon, to the deceased, and that the deceased said they were correct; and Mr. Simon testified that he correctly reduced to writing the statements of the deceased, as interpreted to him, and correctly read them to the interpreter for the purpose of being translated to the deceased; so that it appears from the evidence that the statements as offered in evidence purported to be the dying declarations of the deceased. They were shown to have been made under a sense of impending death, and to be statements of the deceased as to the cause of his death and the identity of the party who inflicted the fatal wound, and were properly admitted in evidence: 1 Greenleaf on Evidence, § 161; *People v. Bemmerly*, 87 Cal. 117 (25 Pac. Rep. 266); *Commonwealth v. Haney*, 127 Mass. 455; *Turner v. State*, 89 Tenn. 547 (15 S. W. Rep. 838); *Jones v. State*, 71 Ind. 66; *State v. Kindle*, 47 Ohio St. 358 (24 N. E. Rep. 485).

2. The circumstances under which the declarations were made, the fact that they were the result of questions propounded by Mr. Simon, the absence of all cross-examination, the use of an interpreter, the fact that Mr. Lafferty saw proper to change interpreters, the presence only of friends and prosecuting officers, and of defendant being unrepresented by counsel, were all matters affecting the credibility and weight, and not the competency of the evidence, and were for the consideration of the jury:

Greenleaf on Evidence, §§ 159, 160; Kerr on Homicide, 415. The competency of dying declarations is a matter for the court to determine, but after they have been admitted, their weight and credibility become questions of fact for the jury, and they are entitled to such weight only as the jury may, under all the circumstances of the case, think proper to give them.

3. The next assignment of error is that one Gritz-macher, a policeman, being called as a witness, produced a pistol, two chambers of which were empty, which he testified he found upstairs in the building in which the shooting occurred, a short time thereafter. Objection was made to the admission of the pistol in evidence because it had in no way been connected with the defendant. The court seems to have admitted it, but at a subsequent stage of the trial withdrew it from the jury because of a failure to connect it with the defendant, and refused to allow it to be considered or used as evidence on the trial. No exception was taken to the ruling of the court in admitting the pistol in evidence, and it may be doubted whether the question as to its competency is properly before us, but, however that may be, it seems to have been admitted only with the understanding on the part of the court that the state would, at some subsequent stage of the trial, connect it with the defendant, and, having failed to do so, it was withdrawn. No error prejudicial to the defendant was committed: *Smith v. Whitman*, 6 Allen, 564; *Pavey v. Burch*, 3 Mo. 447 (26 Am. Dec. 682); *Com. v. Shepherd*, 6 Bin. 283 (6 Am Dec. 449); *Beck v. Cole*, 16 Wis. 99.

4. It is also urged that the admission of proof by the state of statements made by its witness Quong Toy out of court, inconsistent with his testimony as given on the trial, was error; but it nowhere appears in the record that any objection was made, or exception taken, either to the admission of the testimony, or to that of the witnesses who were called to contradict him. On the contrary, counsel for the

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defense cross-examined the witness Quong Toy at great length, as well as the witnesses called to impeach him. We had supposed that if any one question has been settled in this state it is that this is an appellate tribunal, constituted for the purpose of revising and correcting errors of law committed by the trial court, when that court has acted, and the act claimed to be error is disclosed by the record, *Kearney v. Snodgrass*, 12 Or. 311 (7 Pac. Rep. 309); *State v. Tumler*, 19 Or. 528 (25 Pac. Rep. 71), and this we still think to be the law. If a party desires to raise a question in this court as to the competency of evidence offered in the trial court, or of any other supposed irregularity of that court, either of omission or commission, he must, at the time, make his objection, and thereby obtain a ruling of the court, and, if adverse, he must save an exception, and bring it here by a proper bill of exceptions. "It is very important," says Mr. Chief Justice SHAW, "that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel, it might have been avoided by an amendment, or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law, if well founded, either by a ruling in his favor, or by an allowance of the exception, and the rights of both parties be secure." There is no difference in this regard between the rule in criminal and civil cases. In either case we can only revise and correct errors in the rulings and proceedings of the trial court, legally excepted to, and, as Mr. Thompson says, "It is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself on appeal of any irregularities committed on the trial of the case, to make his objection, and to save his exception at the time when the irregularity was commit-

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ted": Thompson, Trials, § 700. As was very pertinently said by Chief Justice WILLIAMS, in the capital case of *O'Kelly v. Territory*, 1 Or. 59, "Prisoners in our courts are provided with counsel; confronted with the witnesses against them; allowed to except to all the court says or does upon trial. And it is no hardship to say that if they have any objection to the acts of the tribunal before which they are tried, they shall make these objections known to such tribunal, or forever after hold their peace." And in *State v. Abrams*, 11 Or. 172 (8 Pac. Rep. 327), which was an appeal from a conviction of murder in the second degree, Mr. Chief Justice WATSON, speaking for the court, says: "Several objections were made and exceptions saved at the trial by appellant's counsel, on the ground of remarks made by counsel for the prosecution to the jury upon matters not in evidence. Some of these remarks attributed to Mr. Dorris, were undoubtedly improper, and can hardly be condemned with too much severity. But, however reprehensible, there is one insuperable obstacle to their being considered here as ground for reversal. They involve no error of the court below. We have announced this principle before (*State v. Anderson*, 10 Or. 448), and we now lay it down as a rule to which there can be no exceptions, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court."

In *McKinney v. People*, 2 Gilman, 540 (43 Am. Dec. 65), which was also a capital case, the court says: "A prisoner on trial under our law has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error, on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglect in proper time to insist on his rights, he waives them." This case was cited

with approval in *Graham v. People*, 115 Ill. 566 (4 N. E. Rep. 790). And in *People v. Guidici*, 100 N. Y. 503 (3 N. E. Rep. 493), and *People v. Buddensieck*, 103 N. Y. 487 (9 N. E. Rep. 44), one of which was a capital case, it was ruled by the Court of Appeals of New York that errors upon criminal trials can be made available only by exceptions duly taken at the trial. In the latter of these cases Mr. Justice DANFORTH uses this very appropriate language: "An exception is not alone for the benefit of the litigant; but it is required for the sake of justice and fair dealing, and in order, among other things, that the attention of the trial judge being called to the supposed error, he may, if he thinks proper, correct it before the jury are called upon to consider their verdict." Any other rule than the one indicated would not only be extremely inconvenient, but subversive of the soundest principles of justice, often resulting in reversals and new trials on grounds which have no connection with the merits, and which would not have been presented had the attention of the trial court been called to the matter at the proper time, and a ruling obtained. The defendant in our courts is always represented by counsel, presumably skilled in the law, active and vigilant in behalf of his client, and upon whom devolves the duty, under his oath, to see that the law is complied with in the conduct of the trial, so that his client may have a fair and impartial trial, and, to guard against any failure in this respect, ample provisions are made by which he may point out and reserve, by objection and exception, for consideration by this court, any action of the trial court supposed to be prejudicial to his client.

5. The fact that the whole record of the trial is before us, on some particular assignment of error, does not authorize or empower us to examine the record to see whether any other error or irregularity in the conduct of the trial can be found, which, if properly excepted to, would justify a reversal. "It is not error simply," says Chief Justice

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WALDO, "but error legally excepted to, that constitutes ground for reversal": *Kearney v. Snodgrass*, 12 Or. 316 (7 Pac. Rep. 309). We have not overlooked the case of the *State v. Cody*, 18 Or. 506 (23 Pac. Rep. 891 and 24 Pac. Rep. 895); in which it was held by a majority of the court that a failure of the trial court to instruct the jury, in a criminal prosecution, where the offense charged necessarily included a lesser offense, that they could find the defendant guilty of the latter, was error of which the accused could take advantage on an appeal without any objection or exception being made or taken in the trial court. But the rule announced in that case is so at variance with the constant practice of this court from *O'Kelly v. Territory*, 1 Or. 59, to the present time, that it can no longer be regarded as authority, and must be considered as overruled.

6. The next assignment of error is in overruling the defendant's motion for a new trial on the ground of insufficiency of the evidence to justify the verdict. It has been the constant and uninterrupted practice of this court from *State v. Bowen*, 1 Or. 271, which was a capital case, to the present time,—with one exception, hereafter to be noted,—to hold that a motion to set aside a verdict, or for a new trial for insufficiency of the evidence, in either a criminal or a civil case, was addressed to the sound discretion of the trial court, and that its ruling thereon cannot be assigned as error in this court on appeal: *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 429; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396 (4 Pac. Rep. 1204); *State v. Becker*, 12 Or. 318 (7 Pac. Rep. 329); *State v. Clements*, 15 Or. 237 (14 Pac. Rep. 410); *Hallock v. Portland*, 8 Or. 29; *Kearney v. Snodgrass*, 12 Or. 311 (7 Pac. Rep. 309). In *State v. Mackey*, 12 Or. 154 (7 Pac. Rep. 309), which was an appeal from a conviction of murder in the first degree, LORD, J., says: "The bill of exceptions purports to contain, in substance, the whole testimony, and the first point suggested is the insufficiency of the evidence

to justify the verdict. The alleged error applies to the denial of the defendant's motion for a new trial. There are cases in which it has been held that a motion for a new trial is addressed to the sound discretion of the court below, and that the overruling of such a motion will not be reviewed unless there is a plain abuse of such discretion. This is conceded, but it is earnestly and strenuously insisted that the evidence is so manifestly insufficient, and particularly as against the son, to sustain the verdict, that it falls within the rule laid down in those cases which would authorize the court to review and set aside the verdict. But a different doctrine seems to have been held by this court in *Hallock v. City of Portland*, 8 Or. 29. PRIM, J., in delivering the opinion of the court, said: 'As the motion for a new trial was based wholly upon the insufficiency of the evidence to justify the finding of fact, the granting of the motion was a matter resting wholly in the discretion of the court below, and cannot be reviewed on appeal': *Hilliard*, New Trials, 7; *Pomeroy's Lessee v. Bank of Indiana*, 1 Wall. 597; *Pennsylvania M. Co. v. Brady*, 14 Mich. 260; *Boykin v. Perry*, 4 Jones (N. C.), 325. It is true the evidence against the defendant is wholly circumstantial; and there can be no doubt but what that portion of it which relates to the son is extremely slight upon which to found a verdict, but the authorities cited indicate that such matter is not reviewable on appeal." And in *State v. Clements*, 15 Or. 237 (14 Pac. Rep. 410), it is said by THAYER, J., that "This court long ago held that a matter of that character [motion to set aside the verdict] is not reviewable. Counsel, however, continue, from time to time, to persist in urging such questions upon the consideration of this court, and seem to think that, unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient

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in law to justify its rendition, if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground, and including all evidence in the bill of exceptions tending to establish his guilt. So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here, but it must be raised by an exception at the trial. Should the trial court say to the jury that if they found such and such facts, and there was no sufficient evidence in law to authorize such finding of all or any one of the facts thus submitted, an exception in either case could be saved, and made available. All the evidence, however, would have to be certified to this court, bearing upon the same in the statement of the exception; and the statement in such case must purport to contain all the evidence upon the point. This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such."

The only doubt ever cast upon the soundness of this rule is the implication from the remarks of Chief Justice THAYER in *State v. Olds*, 19 Or. 397 (24 Pac. Rep. 394), in which he expresses his individual opinion that the overruling of a motion for a new trial, in a capital case, for insufficiency of the evidence, is assignable error on appeal. That case was, however, reversed on other grounds, and we think it can hardly be assumed that a majority of the court intended to overrule all the previous adjudications upon the subject, without even noticing or referring to them. The case has never been regarded as authority on this point. At the argument of *State v. Zorn*, 22 Or. 591 (30 Pac. Rep. 317), when the right to appeal from an order denying a motion for a new trial was raised and the case of the *State v. Olds* cited as authority, counsel was interrupted by the then Chief Justice, who stated that he took

that occasion to say that he did not concur in the intimation in that case that overruling a motion for a new trial was assignable error, but that he concurred in the result on other grounds, and counsel was requested to pass to other points in his case, and the court in its decision disregarded that question. The same point has been raised since in this court, and attended with the same result, the court adhering to the rule that its powers are appellate, and it can deal only with questions of law squarely presented as such. The granting of a new trial for the insufficiency of the evidence is not a matter of absolute right, but rests in the sound discretion of the trial court who hears the witnesses, notes their appearance upon the stand, and manner of testifying, is familiar with all the proceedings of the trial and the circumstances surrounding it, and is therefore better able to determine the question as to whether substantial justice will be done by either granting or denying a motion for a new trial than an appellate court can possibly be from merely reading the record.

7. But if, in view of the rule announced in *State v. Olds*, it is thought that counsel had a right to rely upon that case until overruled, we still think there is ample evidence in the record to sustain the verdict. Hem Long, a witness for the state, testified that, in company with the deceased, he went into the "tan" room, where the defendant and two other Chinamen were running the game, and the deceased requested the defendant to pay him a sum of money which he claimed was due on a lottery ticket, but the defendant refused to do so, whereupon some words passed between them, in the course of which deceased said he would have the defendant arrested, or the house "pulled" if the money was not paid. The witness then turned to go out, followed by the deceased, and just as he reached the street he heard two shots fired, and, on suddenly opening the door, saw the deceased fall and the defendant running into the back room. Chin Chuck, another witness,

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testified that he was standing watching the game, when the deceased and the witness Hem Long came in and the deceased asked for money, which was refused by the defendant, when the witness left the room and went into the front room of the saloon, where he was at the time of the shooting; that soon after he left the "tan" room Hem Long and the deceased came out and started for the street, when the defendant, who was following, shot the deceased in the back. The evidence of these two witnesses is corroborated by the dying declaration of the deceased, which, in substance is, that he went into the saloon to demand money on a lottery ticket belonging to a friend, which being refused, he started to leave the building, but was followed and shot in the back by a man whom he identified as the defendant. This evidence, if believed by the jury, and of the weight of which they were the exclusive judges, was certainly sufficient to warrant the verdict, and, while it was directly and positively contradicted by the witnesses for the defense, this court will not disturb a verdict on what might appear to be the mere weight of evidence: *Skaggs v. State*, 108 Ind. 53 (8 N. E. Rep. 695); *Ritter v. State*, 111 Ind. 324; *Hudson v. The State*, 107 Ind. 371 (8 N. E. Rep. 273); *State v. Glahn*, 97 Mo. 679 (11 S. W. Rep. 260); *Sanders v. People*, 124 Ill. 218 (16 N. E. Rep. 81). The credibility of the witnesses, and the weight to be given to the testimony are all proper matters for the consideration of the jury, and, when the verdict has met with the approval of the trial court, as in this case, it will not be disturbed, even if the question was properly here on what we might suppose to be the mere weight of the testimony. As said by that eminent jurist, Mr. Justice DILLON, "We must assume that all the evidence in the case is true, and that the witnesses are all credible, for if there are questions relating to the credibility of witnesses, or if what the evidence proves depends upon the credibility of witnesses, or upon the proper deductions to be drawn from the evidence

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—these are questions, not for the court, but for the jury, under the direction of the court.” And further on in the same opinion, after referring to several decisions of the supreme court of the United States, holding the same doctrine, he says: “Where in any case it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from even undisputed facts; where different men equally sensible and equally impartial would make different inferences—such cases the law commits to the decision of the jury, under instructions from the court”: *U. S. v. Babcock*, 3 Dillon, 577.

The judgment of the court below is therefore **AFFIRMED**.

[Decided June 19, 1893.]

ON REHEARING.

MR. JUSTICE BEAN delivered the opinion of the court.

8. A petition for rehearing has been filed in which it is claimed that the dying declarations of the deceased were inadmissible in evidence because, as argued, they contain merely his opinion as to who did the shooting. The rule is well settled that dying declarations must relate to such facts only as the deceased would have been competent to testify to if sworn as a witness in the case, and not to mere matters of opinion. The test is, whether, if living, the party making the declaration would have been permitted if called as a witness on the trial to have testified to those things contained in the declaration.

9. Applying this rule to the case at hand, the evidence was clearly competent. The first statement of the deceased was: “I was shot in the back and could not see the man that shot me, but I caught a glimpse of him as I fell, and I think that I would know him if I see him.” On the following day, when the defendant was taken to the hospital for identification, the deceased after seeing him made another statement in which he said: “I recognize the

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defendant Don Foot (Foot You) as the man whom I first spoke to when I went into the saloon. He is the stout man I refer to in my previous statement. I then turned and walked away and he shot me. I could see him as I fell; I fully recognize the man I just saw as the man whom I spoke to and who afterwards shot me." There is here no statement of an opinion as to who did the shooting. It is a positive, unqualified declaration of a fact to which deceased could have testified had he been living and called as a witness on the trial. The case of *People v. Wasson*, 65 Cal. 538, relied on in the support of the petition, is wholly unlike the case at bar. In that case the deceased did not see the defendant fire the shot, and did not pretend to know who it was that shot him, and his declaration was merely the expression of an opinion on the subject. Here the deceased saw the man who shot him and positively identified the defendant as the person who inflicted the fatal wound.

Petition denied. Judgment AFFIRMED.

[Argued March 21, 1893; decided April 19, 1893.]

GARROW v. NICOLAI.

[S. C. 82 Pac. Rep. 1036.]

1. **ARBITRATION AND AWARD—AUTHORITY OF ARBITRATORS.**—An award, to be effective as a bar to a subsequent suit over the same matters, should follow the terms of the submission—it should cover everything submitted, but nothing more; though in case the award does cover matters not within the terms of the arbitration agreement, the excess will be separated, if possible, and the award upheld as to the part that is good.
2. **PARTNERSHIP ACCOUNTING—AWARD ON ARBITRATION.**—An award which undertakes to state an account between two partners under an agreement authorizing the arbitrators to examine the books, accounts, and writings of a firm, and determine the profits or losses, the share owned by each of the partners in the plant, and the other profits of the business, and providing that the award shall be binding as a correct statement of the profits or losses of the firm, and of the share or interest of

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each partner, the arbitration being made for the purpose of enabling either partner to purchase the interest of the other—is not consonant with the submission, and is no bar to an action by one partner against the other for a dissolution of the partnership and an accounting.

3. ARBITRATION AND AWARD—ESTOPPEL.—An award will not operate as a bar to an action wherein there appear other facts and issues not contemplated in the original submission or included in the award.

Multnomah County: LOYAL B. STEARNS, Judge.

Suit by Eugene Garrow against Adolph Nicolai for dissolution of a partnership and an accounting. Decree for plaintiff and the defendant appeals. Modified.

Albert H. Tanner (*John H. Mitchell & Son* on the brief), for Appellant.

Jas. F. Watson (*Edw. B. Watson, and Ben B. Beekman* on the brief), for Respondent.

This is a suit by Eugene Garrow against Adolph Nicolai for an accounting. The complaint alleges that in March, 1887, plaintiff and defendant entered into a copartnership under the firm name of Nicolai & Garrow, for the purpose of purchasing and erecting a sawmill in Columbia County, purchasing timber, and running and operating said mill in manufacturing lumber for the benefit of the copartnership. The complaint further alleges that the firm proceeded immediately to carry on said business, purchased machinery, and manufactured lumber from about August 1, 1887, until about the first of May, 1889; and that such lumber was shipped to said Nicolai at Portland, Oregon, and sold by him for the benefit of said firm; that the accounts, when correctly stated, show that large profits were made in said business, insomuch that after paying in full for said mill and plant, the cost of procuring timber, and of manufacturing it into lumber, and all expenses connected therewith, out of the proceeds of the sale of lumber so shipped to Nicolai, there remains a balance of assets belonging to the said firm of about five thousand one

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hundred and seventy-eight dollars and forty-nine cents, besides the said mill and plant, valued at about seven thousand five hundred dollars; that the firm owes about two thousand and forty-seven dollars and sixty-nine cents, leaving as the net profits of the business about ten thousand six hundred and thirty dollars and eighty cents. The plaintiff afterwards, by leave of the court, filed a supplemental complaint, wherein he alleged that on the sixth day of June, 1889, the mill and plant were sold by the sheriff of Columbia County, under executions issued upon two judgments of the circuit court of said county against the said firm for sums aggregating eight hundred and forty dollars and ninety-five cents; that at said sale Nicolai procured one W. H. Conyers to buy in the mill and plant for him, and furnished him with money for that purpose, and that afterward he had the apparent title transferred to defendant James J. Allord, who paid no consideration for it, but took and held it in trust for Nicolai, who afterwards removed said mill from the state, sold it and converted the proceeds thereof to his own use.

The answer denies that the business yielded a profit; that the amount received for lumber by Nicolai was any greater than twenty-nine thousand nine hundred and sixty-seven dollars and twenty-four cents, and denies that the mill was worth more than four thousand dollars; and also denies the allegations of the supplemental complaint, except that the mill and plant were sold. The answer then sets up the following separate defense: That upon the sixth day of May, 1889, plaintiff and this defendant Nicolai mutually agreed in writing to submit their differences arising out of said copartnership, as set forth in the pleadings herein, to arbitration, which agreement was, in substance, as follows: That the plaintiff and defendant, "as copartners by the firm name of Nicolai & Garrow, have been engaged in purchasing, erecting, and operating a steam sawmill and plant in Columbia County, Oregon,

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and in purchasing timber, and manufacturing lumber at said mill, and selling said lumber upon equal terms of division of profits and losses between us in said venture and business, and are unable to agree between ourselves as to what, if any, profit has been realized, or what, if any, losses have been suffered, by said copartnership, as shown by the books, bills, accounts, and writings pertaining to said business, said Nicolai claiming that the general result of said business has been attended with loss, and said Garrow claiming that not only the mill, and plant connected therewith, have been paid for by profit from said business, but that other and further profits have been made therein by said firm.

"Now, therefore, in consideration of one dollar, by each of us paid to the other, the receipt whereof is hereby acknowledged, and of the agreement of each with the other to stand to and abide by such statement, * * * it is hereby contracted and agreed between the said parties hereto that Mr. Chas. H. Richards and Chas. H. Jewett, accountants, of Portland, Oregon, shall, as arbitrators, inspect and examine said books, bills, contracts, accounts, and writings belonging to said copartnership, and in anywise connected therewith, or relating to the said business, and said Jewett and Richards shall ascertain, determine, and state therefrom the profits or losses of said firm of Nicolai & Garrow in said business; and shall also determine the share now owned by each of said partners in said mill and plant, and other profits, if any, of said business; and if the said Richards and Jewett shall be unable to agree between themselves as to a correct and true statement thereof, that then they two shall select another, or third, competent accountant and arbitrator, to be chosen and agreed upon by themselves, and that such account, showing, award, and statement as may be agreed upon by said three arbitrators, or any two of them, shall be final and conclusive between, and binding upon, the parties hereto,

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as a correct and true statement and showing of the profits or losses, as the case may be, of said copartnership of Nicolai & Garrow in said business, and of the share and interest now owned by each of said copartners in said mill and plant, and in any money or further profit, if any, belonging to said firm. * * * It is further agreed that either partner desiring to purchase such interest of the other in said mill and plant, and remaining property and assets of said firm, as so shown, shall be at liberty to do so by paying to the selling partner the value of his said interest, as so ascertained and determined by said arbitration; or if each partner should desire to purchase rather than sell, then each shall have the privilege of bidding such amount over and above the valuation of the interest of the other, as fixed by said arbitrators, as the party bidding shall be willing to pay therefor; and the party bidding the greater amount over such fixed valuation shall be the purchaser, and the other party is hereby bound to sell to him at such offer."

Upon the twenty-second day of May, 1889, the arbitrators in said submission called to their assistance T. T. Struble, as the third arbitrator; and on or about the first day of August, 1889, the arbitrators made their award, which, in substance, finds that "on June 5, 1889, the property belonging to Nicolai & Garrow in Columbia County, Oregon, was sold to satisfy judgments against the said firm, and that the property so disposed of is represented in the ledger accounts under the heads of machinery, fixtures, and live stock, and that the cost of said property, the amount received for the same, and the loss thereon are as follows: Machinery, three thousand two hundred and thirty-four dollars and fourteen cents; fixtures, one thousand and eighty-six dollars and seventy-one cents; live stock, one thousand two hundred and sixty-seven dollars; total, five thousand five hundred and eighty-seven dollars and eighty-five cents; net total from the sale of same as returned by the county clerk of Columbia County, Oregon, one

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thousand and thirty-seven dollars, leaving a loss of four thousand five hundred and fifty dollars and eighty-five cents." The arbitrators found that the firm has an interest in a skid road, and that the value of said road to either of the partners using it would be one hundred dollars for the unexpired term of the lease, and that the firm had an interest in a plank road, leading from the mill to the wharf, and that the value of it to either of the parties using it would be one hundred dollars; and that the value of the firm's interest in a certain messhouse, sleeping quarters, etc., is fifty dollars. Then follows a summary of the cash received during the years 1887 and 1888, amounting in total to twenty-nine thousand nine hundred and seventy-one dollars and sixty-four cents, and cash disbursed for the same years amounting to thirty-two thousand seven hundred and fifty-seven dollars and forty-four cents, showing that the amount disbursed by A. Nicolai, in excess of the amount received for those years, was two thousand seven hundred and eighty-five dollars and eighty cents. The award charges one half of this excess to Garrow, and, after taking into account some other items of debit and credit, the arbitrators found that the plaintiff is indebted to A. Nicolai in the sum of one thousand three hundred and fifty-six dollars and fifty-four cents.

Plaintiff demurred to the defense setting up the arbitration and award, and the demurrer was sustained, and that defense excluded, and plaintiff filed a reply to the remaining new matter in the answer. The cause having been referred to Geo. A. Brodie, Esq., he reported in favor of the plaintiff and a decree was so entered. Defendant appeals. Modified.

MR. CHIEF JUSTICE LORD delivered the opinion of the court.

1. It is claimed that the court erred in sustaining the demurrer to the plea of an arbitrament and award, because

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the award is a conclusive defense to the suit. This is challenged on the ground that the award does not follow the submission, and that if it did, it would not cover the issues in this suit. The facts show that the suit was brought originally to obtain a dissolution of the copartnership, and an accounting of its affairs; that the partners disagreed, the plaintiff claiming that the business had been profitable, and the defendant claiming that it had been unprofitable, and attended with loss; that for the purpose of settling their differences in this regard, they entered into the arbitration agreement set out as a defense; that thereafter, the mill and its appurtenances were sold under execution, and bought by one Conyers, under the circumstances of fraud alleged in the supplemental complaint, and denied in the answer, thus forming an additional issue. To sustain the contention of the defendant it is essential to the validity of the award that it should be consonant with the terms of the submission, and that it should be coëxtensive with the issues involved, in order to operate as a bar to the suit. It is a fundamental principle that the award must be consistent with the submission, and that it must not extend to persons or things which are not embraced within its terms. Mr. Caldwell says: "It is one of the requisites of a valid award that it be consonant to the submission," and it "must not extend to persons or things beyond the scope of the submission": Caldwell, Arbitration, 226-7. The power of the arbitrators is derived entirely from the submission, and any award which they may render in excess of the power conferred upon them, will be void. The submission is the measure of their authority, and necessarily they must confine their judgment to the matters submitted by it, and not extend it to those not comprehended within its scope. In *Carnochan v. Christie*, 11 Wheat. 446, it was held that an award must decide the whole matter submitted to the arbitrators, and that it must not extend to matters not embraced in

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the submission. In commenting upon the requisites of a valid award, GILCHRIST, C. J., said: "It is that the award shall embrace all the matters of dispute submitted, or, in other words, shall follow the terms of the submission, so that the parties may have accomplished all the substantial purposes they may be supposed to have had in entering upon the reference." An award which puts an end to the original controversy is a conclusive bar to an action on the original matter. It has the same effect as a judgment, and concludes the parties to the controversy effectually from litigating the same matters anew. It is in the nature of a judgment, and ought to be decisive, for if it does not determine the matter it becomes the cause of a new controversy: *Bacon's Abridgment*, 331; *Colcord v. Fletcher*, 50 Me. 398. "The decision, if valid," says FOSTER, J., "is a judgment, or in the nature of a judicial decision, rendered by agreement of the parties; and it is to be enforced as if the parties had agreed, without arbitration, that their rights are what the arbitrators have decided": *Truesdale v. Straw*, 58 N. H. 218. There is, and ought to be, no difference in the effect of an adjudication, as a bar to a subsequent suit for the same cause, whether it is pronounced by judges selected by the parties or appointed by the state. "In either case," GARDNER, C. J., said, "every consideration of public policy requires that after the parties have been once fully and fairly heard further litigation as to the same matter should cease, and no satisfactory reason can be assigned why a judgment, as an act by the law, should estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subject submitted, should not be equally conclusive": *Brazill v. Isham*, 12 N. Y. 15.

It would seem plain upon sound principles of law and justice, that, whenever two persons submit any particular matter or matters in dispute or controversy between them

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to the determination of a third person, whom they have mutually selected, his power to act as a judge is limited to the particular matter or matters specified, and that any exercise of his judgment upon any other question is a usurpation. The award must be within the authority conferred by the submission under which it is made, and if it exceeds that authority it is void, at least for the excess. An award will be construed favorably, so as to uphold it, if possible. No intendments will be indulged to overturn it, but, on the contrary, every intendment will be made in its favor. If the award be good in part, and bad in part, that which is good may be separated from that which is bad, and the one is in nowise dependent on the other. Under the rule that all reasonable presumptions and intendments are to be indulged in favor of the validity of awards, the court will uphold the award as to that part which is good, and reject that part which is bad, in order to give effect to the action of the arbitrators as far as it is possible to do so, consistently with the agreement of the parties: 1 Am. & Eng. Enc. 710. But this principle can have no application where, upon the face of the award, the arbitrators have undertaken to decide other or different questions than those which are submitted to them. When the parties have specified the particular matters in dispute upon which the arbitrators are authorized to make an award, it cannot be presumed that they are empowered to make an award upon other and different matters. To so hold, would bind the parties by an award upon matters to which they never consented that the arbitrators should consider or decide. Such an award is not binding upon either party, because it is founded upon matters which the arbitrators had no authority to decide, and consequently it is of no legal validity.

2. It remains to apply these principles to the case at bar. By the terms of the submission the plaintiff and defendant agree that the persons named therein as arbitra-

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tors shall examine the books, accounts, and writings relating to the copartnership business, and ascertain and determine therefrom the profits or losses of the firm, the share now owned by each of the partners in the mill and plant, and other profits, if any, of the business, and that the award made by them shall be binding upon the plaintiff and defendant as a "correct statement of the profits or losses, as the case may be, of the copartnership in the business, and of the share and interest now owned by each partner in the mill and plant, and in any money or further profits, if any, belonging to the firm." It will be seen, therefore, that the particular matters which are submitted to the judgment of the arbitrators, and which they are to ascertain from the books and writings of the partnership, are (1) the profits or losses of the firm; (2) the share of each partner in the mill and plant; and (3) other profits, if any, of the business. It was upon these specified matters that the arbitrators were authorized to make an award. They were not invested with authority to pass judgment upon any other matters than those designated. As these, and especially the first, were the particular matters about which the partners were unable to agree, and which were the cause of their controversy, they were the only matters that they included in the submission, or upon which they desired the judgment of the arbitrators.

As an award must be consonant to the submission, it is plain, tested by the principles announced, that the award cannot be sustained. There is no attempt to decide specifically a single one of the matters submitted. The award on its face undertakes to state an account between the parties, which is a matter outside of the scope of the submission. The particular matters were specified which the arbitrators were to decide, and, to enable them to make their findings upon them, the agreement required that they should examine the books and accounts of the partnership, and ascertain and state therefrom each of such mat-

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ters, so that either party desiring to purchase the interest of the other should be at liberty to do so by paying to the selling partner the value of his interest as so ascertained, determined, and stated; or, if each partner should desire to purchase rather than sell, then each should have the privilege of bidding such amount over and above the valuation as so ascertained and determined, etc., as provided in the contract. The award of the arbitrators defeats the operation of this provision and renders it nugatory. It is true that the award states generally that the business was conducted at a loss, but this conclusion is derived from stating an account between the partners, in order to show the indebtedness of the one to the other, by which it appears that the defendant gets the benefit of the sale of the property under execution, at a loss to the firm of four thousand five hundred and fifty dollars. In other words, the arbitrators charged the firm with five thousand five hundred and eighty-seven dollars as the value of the mill, fixtures, and live stock, and credited the firm with the sum of one thousand and thirty-seven dollars as the surplus derived under the execution sale of the same upon the judgments aforesaid for about eight hundred dollars and costs, showing a loss of four thousand five hundred and fifty dollars. The injustice of this result illustrates the wisdom of the rule that the award should follow the submission. The arbitrators had nothing to do with the appraisement or estimate of the value of the mill property, but they could not state an account between the partners, and find out which one was indebted to the other without doing so. It was the consequence of undertaking to do what they were not authorized to do under the submission. The submission does not authorize the arbitrators to state an account between the partners. The award is not consonant to the submission. It omits to decide the particular matters which were submitted, and undertakes to decide another matter not submitted.

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3. But, conceding for the purposes of the case that the award pursues the submission, it must cover the issues involved here to operate as a bar to this suit. The facts alleged in the supplemental complaint show that after the suit was begun for a dissolution and accounting of the partnership affairs, the agreement to arbitrate was entered into, but that before the award was made the mill and plant were sold under execution and purchased by one Conyers, and that after the award was made the plaintiff filed his supplemental complaint, in which, among other things, he alleged in effect that at said sheriff's sale the defendant, intending to cheat and defraud the plaintiff out of his interest in the mill property, confederated with one Conyers, and procured him to buy said property in his own name, but for the use of the defendant; that Conyers purchased the same with the money of the defendant and held it for his use and benefit; and that thereafter Conyers, at the request of the defendant, and without any consideration, transferred the title and possession of the property to Allord, etc. The defendant, after denying all the material allegations, set up the award to which the demurrer was sustained, claiming that it was conclusive of the suit. It will be seen, therefore, if it be conceded that the award did follow the submission, and was intended to put an end to the original controversy, that the additional matter set up in the supplemental complaint exhibits a state of facts—presents an issue—not contemplated by the submission, nor included in the award, and to which the award has no relevancy. The award does not meet the matters in issue between the plaintiff and defendant, even if we give it a construction not warranted by its terms, and assume that it was intended to settle the controversy out of which arose the suit as originally brought. To give it the conclusive effect claimed, we should have to ignore the issue of fraud alleged, and render a decree for the amount found due the defendant in the award, which

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was ascertained in disregard of the submission. In any view we are unable to see that any error was committed by the court below in sustaining the demurrer.

Upon the merits it is difficult, as the referee says, to arrive at a true state of the facts, owing to the incomplete manner in which the books were kept. Holding, as we think we ought, the defendant as trustee of the mill property, the question which has given us the greatest difficulty is its value. At the sheriff's sale the live stock was sold first, and then the mill and fixtures for the price already stated. The money received for the live stock and the mill and fixtures, after paying the judgment and costs, was paid over to the defendant. If the defendant be given credit for the amount for which the mill sold, and the mill and plant be considered as held by him, the question then arises, what is its value? The referee and court below valued it at three thousand five hundred dollars. The books show that the mill and plant cost considerably more than that sum, but the mill has been used for some time, and the live stock was perhaps not so valuable as when purchased. There is a very great disagreement among the witnesses as to the value of the mill property. It is not possible to arrive at an exact conclusion, but we think, taking all matters into consideration, that two thousand five hundred dollars would be its proper valuation, and the sum with which the defendant should be charged instead of three thousand five hundred dollars.

The judgment will be MODIFIED accordingly.

Argument of counsel.

[Argued April 13, 1893; decided April 24, 1893.]

HOUSE v. JACKSON.

[S. C. 82 Pac. Rep. 1027.]

1. **MUTUALITY OF CONTRACT—OPTION TO PURCHASE—SPECIFIC PERFORMANCE.**—One not bound by a contract cannot call upon a court to enforce specific performance thereof against the other party, by expressing a willingness to accept its terms; but an option to convey real estate or renew a lease may be specifically enforced, without any covenant or obligation to purchase or accept, if made upon a proper consideration, for when the option is accepted, the minds of the parties have met, and the contract thus becomes mutual.
2. **CONSIDERATION FOR CONTRACT—OPTION TO PURCHASE.**—The contract to pay the rent secured by a lease of real property is a sufficient consideration for an option in such lease to purchase the property.
3. **IDEM.**—Improvements made upon property under a prior lease are sufficient consideration to support an option contained in a renewal lease for the purchase of the property.
4. **DESCRIPTION OF REAL PROPERTY.**—A description in a deed or agreement is sufficient when it states that the property is situated on a certain island, and is known by a special name, and is more particularly described in certain deeds between parties named which are recorded in certain counties, and that the tract contains a definite number of acres. *Whiteaker v. Vanschoiack*, 5 Or. 113, disapproved; *Raymond v. Coffee*, 5 Or. 132, and *Boehringer v. Creighton*, 10 Or. 42, cited and approved.
5. **SPECIFIC PERFORMANCE—ACTION BY ASSIGNEE.**—An option to purchase land may be specifically enforced at the suit of an assignee thereof.

Multnomah County: GEO. H. BURNETT, Judge.

Action by E. House against Ellen L. Jackson and William R. Jackson for the specific performance of a contract to convey certain land. From a decree dismissing the complaint, plaintiff appeals. Reversed.

William W. Thayer, and *Lawrence A. McNary* (Chas. H. Carey on the brief), for Appellant.

The rule that a court of equity will not compel the specific performance of unilateral contracts is not applicable to a case of the kind before us. Where a contract is entered into which is intended by one or both parties to

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24	89
130	130

24	89
32	133

24	89
133	325

24	89
48	506

24	89
46	315

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be binding upon both, and it is found that for some reason it cannot be enforced against one party,—under such circumstances the party not bound will not be allowed specific performance against the one who is, but it will be found that the rule of mutuality in no way obtains against contracts containing future options, where the option is expressly stipulated by the party sought to be bound. Mutuality attaches in such cases when the one to whom it is extended notifies the other of his acceptance: *Pomeroy*, Specific Performance, § 169; *Waterman*, Specific Performance, § 200; *Fry*, Specific Performance, § 291; *Boston & Me. R. R. v. Bartlett*, 3 Cush. 224; *Maughlin v. Perry*, 35 Md. 352; *Perkins v. Hadsill*, 50 Ill. 216; *Masten v. Grimes*, 88 Mo. 478; *Johnson v. Trippe*, 33 Fed. Rep. 530; *Moses v. McClain*, 82 Ala. 370; *Shollenberger v. Brinton*, 52 Pa. St. 51-99; *Justice v. Lang*, 42 N. Y. 509; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Kerr v. Day*, 53 Am. Dec. 526; *Hall v. Center*, 40 Cal. 63; *Ewens v. Gordon*, 49 N. H. 444.

By sufficiency of description of land to enable a court of equity to enforce specific performance of contract to convey, is meant such description as discloses the intention of the parties as to the parcel to be conveyed, and not such a description as designates the exact boundaries, or dispenses with extrinsic reference: *Ragsdale v. Mays*, 65 Tex. 255; *Talman v. Franklin*, 3 Duer, 395; *Romans v. Langevin*, 34 Minn. 312; *Reed v. Hornback*, 44 J. J. Marsh. 376; *Murdock v. Anderson*, 4 Jones Eq. 77; *Eggleston v. Wagner*, 46 Mich. 610; 1 Reed, Stat. of Frauds, §§ 408, 409; *Smith's Appeal*, 69 Pa. St. 474.

Samuel B. Houston, for Respondent.

It is shown by this testimony that this tract of land is worth from five to eight thousand dollars. It would be a harsh proceeding on the part of a court of equity, after the expiration of five years, to use its extraordinary powers to compel a man to give another six thousand dollars'

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worth of property for two thousand five hundred dollars, and the court should properly exercise its discretion by refusing to enforce the performance of such an agreement. There are many authorities which hold that a court will not enforce an agreement of this kind after a long delay, and where the property has greatly enhanced in value: *Gasque v. Small*, 2 Strob Eq. 75; *Pomeroy*, Specific Performance, § 38; *Powers v. Hale*, 5 N. H. 145; *Moore v. De Lancey*, 3 Cow. 445-516, *id.* 6 Johnson, Ch. 222; *Story* Eq. vol. II. § 769; *Harper v. Sexton*, 22 Iowa, 446; *M. & M. R. R. Co. v. Cromwell*, 91 U. S. 646; *Willard v. Tayloe*, 75 U. S. 557; *Marble Co. v. Ripley*, 10 Wall. 359; *Cooper v. Pena*, 21 Cal. 411. The supreme court of this state has decided that it is a matter of judicial discretion whether such a contract will be enforced: *Snyder v. Lehnherr*, 5 Or. 385; *Knott v. Stephens*, 3 Or. 271. See also *Rigg v. Reed*, 5 Humph. 529 (42 Am. Dec. 447); *Byron v. Loftus*, 39 Am. Dec. 242; *Young v. Daniels*, 2 Iowa, 126 (63 Am. Dec. 477).

It is laid down by all authorities, and as a universal principle that before a contract will be specifically enforced it must be mutual that it must bind both parties. Is this such a contract? It binds the lessors to sell, but nowhere by implication or averment does it bind the lessee to buy. Most all authorities hold that this kind of a contract will not be specifically enforced by a court of equity. The following authorities, it seems to me, are sufficient to establish the doctrine that the contract must be mutual: *Benedict v. Lynch*, 1 Johnson Ch. 370 (7 Am. Dec. 484); *Dekardova v. Smith's Admx.* 9 Tex. 129; *Parkhurst v. Van Cortland*, 1 Johnson Ch. 282 (7 Am. Dec. 427); *Bodine v. Glading*, 21 Pa. St. 50 (59 Am. Dec. 749); *Moore v. Fitz Randolph*, 6 Leigh, 175 (29 Am. Dec. 208).

It is universally laid down, that a description of the land when the contract is sought to be specifically enforced, must be definite and certain: *Blankinship v. Spenser*, 31 W. Va. 510 (7 S. E. Rep. 433); *Westfall v. Cothills*, 24 W.

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Va. 793; *Hollenbeck v. Prior*, 40 N. W. Rep. (Dak.), 347; *Preston v. Preston*, 95 U. S. 200; *Purson v. Balland*, 32 Minn. 263 (20 N. W. Rep. 163); *Asken v. Can*, 8 S. E. Rep. 74; *Nippolt v. Rammon*, 59 Minn. 372 (40 N. W. Rep. 266); *Angel v. Simpson*, 3 So. Rep. 758 (Ala.); *Soles v. Hickman*, 20 Pa. St. 334; *Lyma v. Hayden*, 119 Mass. 482; *Miller v. Campbell*, 52 Ind. 125. The same rule has been enunciated in our own supreme court: *Odell v. Morin*, 5 Or. 96; *Whiteaker v. Vanshoiack*, 5 Or. 113; *Brown v. Lord*, 7 Or. 311; *Wagonblast v. Whitney*, 12 Or. 89.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit brought by the appellant against the respondents to compel the specific performance of a contract to sell real property, contained in the following agreement:—

“This indenture of lease made and entered into on this nineteenth day of January, 1887, by and between Ellen L. Jackson and Wm. R. Jackson, her husband, of Washington County, Oregon, parties of the first part, and J. B. Haley, of Multnomah County, Oregon, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the yearly rental of one hundred and fifty dollars, and the covenants and agreements hereinafter mentioned, lease unto said party of the second part, for the term of five years and three months from the first day of January, 1887, the following described premises to wit: That certain tract of land situated on Sauvies Island, and known as the Jackson Ranch, and more particularly described in certain deeds from Meir & Frank and Richard Hall to W. R. Jackson, and recorded in the records of Multnomah and Columbia Counties, Oregon, and containing two hundred and eighty-seven (287) acres, more or less. And the said party of the second part herein agrees to pay the said yearly rental of one hundred and fifty (\$150) dollars, in the following manner, to wit: Seventy-

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five (\$75) dollars on the first day of July and the thirty-first (31st) day of December of each and every year during the continuance of this lease. And the said parties of the first part further agree to sell said tract of land and convey the same by a good and valid deed to the said party of the second part at any time before the expiration of this lease for the sum of twenty-five hundred (\$2,500) dollars. And the said party of the second part hereby agrees that in case he fails to purchase said tract of land before the expiration of this lease, for the above stipulated consideration, he shall forfeit to the said parties of the first part all rights and claims to any improvements that he shall have made thereon. And the parties to this agreement and lease hereby bind themselves, their heirs, executors, administrators, or assigns to the faithful performance of the covenants and agreements herein mentioned.

"In witness whereof we have hereunto set our hands and seals on the day and year above written.

"ELLEN L. JACKSON. [SEAL]

"WM. R. JACKSON. [SEAL]

"JOHN B. HALEY. [SEAL]

"Executed in the presence of,

"CHAS. A. BUTLER.

"J. W. MORGAN.

"It is further stipulated and agreed by and between the parties of the first and second part in the above and foregoing lease, that all said sums of money therein agreed to be paid by said J. B. Haley, for rent or otherwise, shall be paid to the said Ellen L. Jackson, her heirs and assigns.

"ELLEN L. JACKSON. [SEAL]

"WM. R. JACKSON. [SEAL]

"JOHN B. HALEY. [SEAL]

"Executed in the presence of,

"CHAS. A. BUTLER.

"J. W. MORGAN."

It appears that J. B. Haley went into possession and occupied said premises and paid the rent due thereon until about November 30, 1889, when, in consideration of two hundred dollars, he assigned all his interest therein to one W. G. Pomeroy, that Pomeroy went into possession, paid the rent, and occupied the premises until about September 12, 1890, when, in consideration of five hundred dollars, he assigned all his interest therein to D. Reghitto and plaintiff, who went into possession thereof; that said Reghitto about December —, 1891, assigned his interest to plaintiff, who continued to occupy the premises, and paid the rent due thereon, and on January —, 1892, tendered to defendants two thousand five hundred dollars, and demanded a deed thereto; that the defendants refused to accept said tender, or to execute said deed, whereupon plaintiff deposited said amount with the clerk and commenced this suit. After the issues were completed the cause was referred to Geo. A. Brodie, Esq., who found that the equities were with the plaintiff, and that he was entitled to a decree, but the court set aside said findings, and entered a decree dismissing the complaint, from which the plaintiff appeals.

To support the decree the respondents contend — *First*, that the contract is not mutual; *second*, that the premises cannot be identified from the description; and, *third*, such contracts cannot be enforced by an assignee.

1. The rule is well established that to entitle a party to specific performance of a contract, there must have been, at the time of its execution, a mutuality, both as to the obligation and the remedy,—an agreement to buy as well as an agreement to sell,—and that a party not bound by the agreement has no right to call upon the court to enforce performance against the other party, by expressing a willingness to accept the terms of the contract: *Waterman, Specific Performance*, § 196. This general rule, like most others, has its apparent exceptions. "It is now well settled

that an optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it": *Waterman, Specific Performance*, § 200. Such exception is less real than apparent, for when the option is accepted, the minds of the parties have met and agreed upon the terms of the contract, and it thus becomes mutual, and is enforceable by either party. If no consideration for the option exists, it may, upon notice to the other party, be withdrawn at any time before acceptance. In the case at bar there is no agreement on the part of Haley to purchase the property, and his option is not binding upon the defendants unless some consideration therefor existed at the time the contract was executed.

2. Was there any consideration for the option, is the first question presented. It has repeatedly been held that in a lease of real property, containing an option to purchase the same, the contract to pay the rent was a sufficient consideration to support the option. In *Souffrain v. McDonald*, 27 Ind. 269, ELLIOTT, J., in support of this doctrine, says: "The stipulation, on the one side, to lease the lot for a period of two years, with the right of the lessees, within that time, to purchase the same at the price and on the terms stated in the agreement, and, on the other side, to pay the rent agreed upon and to erect the fence, must be considered as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration of as well for the privilege of, becoming the purchasers of the lot, as for its use." In *Stansbury v. Fringer*, 11 Gill & John. 149, real property had been leased for a term of twelve years in consideration of the payment of the taxes and of the erec-

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tion of a dwelling house thereon; with an option to purchase the same. In a suit for specific performance, CHAMBERS, J., says: "When a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from, or compensate for, the consideration, or any portion of it, exclusive of other stipulations, unless the parties have expressly so declared." In a similar case the court in *Maughlin v. Perry*, 35 Md. 353, says: "As a part of the consideration of the lease constituting the contract between the parties, Wells, the lessor, covenanted to sell the property to Hyson, his lessee, for one thousand five hundred dollars, at any time during the existence of the lease. This was a continual obligation, running with the lease, on the part of the lessor, with the option in the tenant to accept the same or not, within that time."

3. From the testimony of Haley, the lessee, it appears that when the lease was executed he considered the rent worth one hundred and fifty dollars per year, and from this, the respondents contend that there was no consideration for the option. The defendant Wm. R. Jackson testifies that Haley had occupied the premises for a term of five years under a prior lease, and paid the same rent therefor, and that he had erected a house and barn thereon which he threatened to remove if he could not secure a renewal of the lease. Haley also testifies that he would not have taken the present lease if it had not been for the option, as he wanted to get the benefit of the improvements he had made on the place. We think it conclusively appears that the improvements made upon the property under a prior lease constituted the real consideration for, and is sufficient to support, the option contained in the present lease.

4. The description contained in the agreement must be so definite as to show what the purchaser supposed he was contracting for, and what the vendor intended to sell. The description may be wholly or partly contained in a separate document, which, if referred to by the other portions of the written contract in such manner as to connect them, becomes a constituent part thereof. A description of the subject matter in a deed is sufficient when it complies with the maxim, *id certum est certum reddi potest*: Pomeroy, Specific Performance, §§ 152, 153. If the land has, as a tract or lot, acquired a name to distinguish it, and by which it is known, the same may be conveyed without a reference to boundary lines: Sedgwick & Wait, Trial of Title, § 461; *Radford v. Edwards*, 88 N. C. 347; *Truett v. Adams*, 66 Cal. 218 (5 Pac. Rep. 96). In the case at bar the testimony of the witnesses shows that the tract described is known as the "Jackson Ranch." It also appears that it is, or was, known as the "Joy and Jackson Ranch." There is no conflict, however, in the identity of the property when described by either name. The object and purpose of a description of real property is to mark out and designate the boundaries of a portion of the earth's surface, and if this can be done as well by one name as another, that object has been fully accomplished. The rule for determining the sufficiency of a description in a deed, or any other writing in relation to real property, is as follows: Can a surveyor, with the deed or other instrument before him, locate the land and establish the boundaries? *Willamette Co. v. Gordon*, 6 Or. 175; *Pennington v. Flock*, 93 Ind. 378. In *Smiley v. Fries*, 104 Ill. 416, SCHOFIELD, J., says: "This court has ruled that any description by which the property might be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient." When a deed refers to another, or to a map, for a more specific description of the land conveyed, the deed or

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map to which reference is thus made is considered as incorporated in the deed itself: Devlin, Deeds, § 1020. The contract refers to certain deeds from Meier & Frank and Richard Hall to W. R. Jackson, which were recorded in Multnomah and Columbia Counties, Oregon, thus making these deeds a part of the contract for a more specific description. The contract recites that such deeds were recorded in both counties, and, between the parties, is a conclusive presumption that such fact exists and required no proof thereof: Hill's Code, § 775. The evidence of parties who are not surveyors shows that they know the Jackson Ranch on Sauvie's Island and can locate the boundaries thereof. If they can do this without the deeds, is it not safe to presume that a surveyor with these deeds in his possession could do the same? Counsel for respondents has cited many authorities to show that the description contained in the lease is not sufficient to identify the property. In nearly every case thus cited the description was clearly defective, and it was impossible from an inspection of the memorandum to locate the premises. He attaches much importance to the case of *Whiteaker v. Vanschoiack*, 5 Or. 113, in which MOSHER, J., says: "Not only must a contract for the sale of lands be in writing, under the statute, but the lands must be certainly described in the writing, so as to be capable of identification without reference to extrinsic proof." We think this language, limiting the foregoing rule, is too narrow, and that the same learned justice in *Raymond v. Coffee*, 5 Or. 132, gave a proper interpretation of the rule when he said: "It is too late to controvert the legal proposition that what constitutes a boundary in a deed is a fact for the jury and may be proved by any kind of evidence which is competent to prove the fact." "In explaining by oral testimony where and how the objects referred to in the written documents were in fact made or existed, those muniments of title are not altered by parol evidence." Such has been the rule of

this court since that time: *Boehringer v. Oreighton*, 10 Or. 42. We think the description sufficient to identify the property. There is no conflict between the parties as to the particular land intended, and each understood it to be just what it purports to have been.

5. The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed; and when an agreement has been made for the sale of lands, the vendor is deemed the trustee of the purchaser of the estate sold, and the purchaser as trustee of the purchase money for the vendor. The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser: *Kerr v. Day*, 14 Pa. St. 112 (53 Am. Dec. 526). Haley had an estate in the premises, and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor. The evidence shows that at the time the contract was executed the property was worth no more than the amount named in the option, and several witnesses fix the value at that time at a much less sum. Because the value of the property has increased, is that any reason why a court of equity should refuse to decree specific performance of a contract which was fair and equitable at the time it was executed? It is said that such decrees rest in the discretion of the court. This does not mean the exercise of an arbitrary will governed by mere pleasure of the court, but is controlled by fixed rules and principles, in view of the special features and incidents of each case. Courts cannot make contracts for parties, but should enforce them in the furtherance of justice, when fair and equitable.

Statement of the case.

The decree of the court below will be REVERSED, and a decree here entered for the specific performance of the contract.

[Decided April 24, 1893.]

STATE v. HENDERSON.

[S. C. 82 Pac. Rep. 1030.]

24 100
48 110

1. HOMICIDE—HEAT OF PASSION—CODE, § 1727.—A design to kill, formed in the midst of a conflict, when reason is obscured by passion, does not make a homicide murder in the first degree, although the slayer has at the time enough reason and reflection left to enable him to know that he is about to take, and to intend to take, the life of his adversary.
2. EVIDENCE—RES GESTÆ.*—On a trial for murder, a declaration of the deceased, made at the time of and during the affray, is admissible as part of the *res gestæ*.

Clackamas County: THOMAS A. McBRIDE, Judge.

William Henderson was convicted of murder and appeals. Reversed.

Henry E. McGinn (*Alfred F. Sears*, and *Nathan D. Simon* on the brief), for Appellant.

George E. Chamberlain, attorney-general, and *W. N. Barrett*, district attorney (*Geo. C. Brownell* on the brief), for the State.

Attorney for the defendant excepted to the ruling of the court in refusing to strike out the following portion of witness J. L. Thomas' testimony: "I think he said, it seems to me he said, I will kill you, or made some threat; just what he said I wouldn't be positive." Thomas said he made some threat, he thought it was, "I will kill you." That he made the threat there was no doubt, and he

*NOTE.—The question how near the main transaction a declaration must be to constitute part of the *res gestæ* is presented in a voluminous note to *Ohio & Mississippi R. R. Co. v. Stein* (Ind.), 19 L. R. A. 733.—REPORTER.

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thought the exact words were, "I will kill you." The witness was entitled to give the substance of the words used by the defendant and his best recollection of what the words were, and was not required to exclude all doubt from his mind. This is all he attempted to do, and certainly the jury were entitled to take it for what it was worth: 1 Greenleaf, § 440, 14th edition; Wharton, Criminal Evidence, § 461, 9th edition; *Boyer v. Teague* (N. C.), 19 Am. St. R. 560; *Printup v. Mitchell* (Ga.), 63 Am. Dec. 260.

Defendant's attorney also excepted to the ruling of the court in refusing to strike out the following testimony of witness Thomas: "Yes, he has cut me in the guts, he has killed me without a cause," because the witness did not know whether the defendant was there or not. We think the testimony of other witnesses shows that defendant was in the room when the remark was made, but in any event it was admissible as a part of the *res gestæ* and as a dying declaration: Code, § 686; 1 Greenleaf, Evidence, § 108 and n(a), 14th edition, *Sullivan v. O. R. & N. Co.* 12 Or. 397-401; *State v. Garrand*, 5 Or. 218; *State v. Saunders*, 14 Or. 305; *Thomas v. Herald*, 18 Or. 546.

Also to instruction, as to deliberation and premeditation, we do not think the court erred: *State v. Ah Lee*, 8 Or. 215 (221); *State v. Carver*, 22 Or. 602 (604); 9 Am. & Eng. Enc. 543; *State v. Garrand*, 5 Or. 216; 1 Wharton, Criminal Law, § 116.

That definition of cool blood was correct. See *State v. Ah Lee*, 8 Or. 215 (221); *State v. Anderson*, 10 Or. 463; *State v. Abrams*, 11 Or. 178.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was indicted, tried, and convicted of murder in the first degree in killing one Cyrus Suter, by stabbing him with a pocket knife. The evidence tended to show that the deceased and the defendant had for some

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two or three hours immediately prior to the homicide been playing cards and drinking liquor in a saloon at Canby; that some dispute had arisen over the game, and defendant had threatened to quit playing, but, at the solicitation of the deceased, continued in the game, and that just prior to the killing the dispute or quarrel was renewed, when the defendant again arose from the table and said he would not play any more, that Suter had been trying to run over him all day. The deceased, who was a much larger and stronger man than the defendant, then got up from the table, approached and took hold of the defendant,—whether in a peaceable or violent manner the witnesses are not agreed,—when, as claimed by the state, defendant stabbed him with an ordinary pocket knife, whereupon the deceased seized a chair and attempted to strike him with it, but was prevented from doing so by a bystander. The defendant and deceased then engaged in a hand to hand conflict, and defendant was thrown and held down on the floor by the deceased until the bystanders interfered. At some time during this affray the fatal wound was inflicted, but just at what time is not clear.

1. The court, in its instructions to the jury, in defining the crime of murder in the first degree, said: "The law also requires, in order to constitute murder in the first degree, that the design should be formed in cool blood, and not hastily on the occasion, and unless it is so formed in cool blood there can be no murder in the first degree; but by cool blood is not meant that a party must be in a wholly unexcited and philosophical state of mind. If he still has left the power of controlling the operations of his mind, and realizing the act that he is doing, and its nature and quality and wrongfulness, he may be said to be in cool blood, even though he may be somewhat excited or somewhat angry." As applied to the facts of this case, it seems to us this instruction must have led the jury to believe that no heat of passion on the part of the defendant

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short of the dethronement of reason would reduce the crime below murder in the first degree.

To constitute murder in the first degree, it is necessary that the design to take life be formed and matured in cool blood and not hastily upon the occasion: Hill's Code, § 1727. It must be the result of a deliberate and premeditated act, in pursuance of a design formed and matured when the perpetrator is master of his own understanding, and after time and opportunity for deliberate thought. But if, after the mind conceives the thought of taking life, the conception is meditated upon, and a deliberate determination formed to do the act, then, no difference how soon the fatal resolve is carried into execution, it is murder in the first degree. But when the purpose or intent to kill is formed in the midst of the conflict, and followed immediately by the act, it can be only murder in the second degree, even if the passion and provocation are not sufficient to reduce it to manslaughter, for the time and circumstances are not such as to allow deliberate thought; and yet it is the result of a formed design and purpose to kill, and the perpetrator still has left the power of controlling the operations of the mind and realizing the act he is doing, and its nature and quality and wrongfulness, and, under the instruction given by the court in this case, would be in cool blood.

It is perhaps difficult to formulate any general rule as to the extent to which the passions must be aroused and the reason disturbed to reduce the offense below murder in the first degree, but it certainly will not do to say that reason must be entirely dethroned, and the passion so overpowering as for the time being to shut out knowledge and destroy volition: 2 Wharton, Homicide § 969; Kerr, Homicide § 68; *State v. Hill*, 1 Dev. & B. 491 (34 Am. Dec. 396); *Young v. State*, 11 Hump. 200. Such a mental disturbance would be almost if not quite equivalent to utter insanity. The rule, as stated by CHRISTIANCY, J., in the leading case

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of *Maier v. People*, 10 Mich. 212 (81 Am. Dec. 781), is "that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men of fair average disposition liable to act rashly, or without due deliberation or reflection, and from passion rather than judgment." And, says the same learned judge, "if the act of killing, though intentional, be committed under the influence of passion, or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool, and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than that of any wickedness of heart, or cruelty or recklessness of disposition, then the law, out of indulgence to the frailty of human nature, or rather in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder." Where the provocation is not sufficient to induce such a state of mind in an ordinary man of fair average intelligence, or if there has been time for the passion to subside and reason to resume its sway, or if there is evidence of actual malice, or if the act be perpetrated by, or circumstances indicate that it was the result of, a wicked and malignant disposition and heart, in all such cases it will still be murder in one or the other degrees. In order to reduce the offense below murder, all these things must be wanting, and the act must be done while reason is obscured by passion, so that the perpetrator acts rashly, and without reflection and deliberation. In the case at bar, it is apparent that the design to kill was formed at some time after the dispute and quarrel had commenced, and when both parties were more or less under the influence of passion; and the instruction under consideration asserts the principle, as applied to the facts, that although the design may have been formed in the midst of the conflict, when reason was obscured by passion.

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it would still be murder in the first degree, if defendant had left, at the time, so much of reason and reflection as to enable him to know that he was about to take, and to intend to take, the life of his adversary; and this, it seems to us, fails to give to the defendant the indulgence which the law accords to the frailty of human nature when provoked to passion, and was error.

2. We think there was no error in refusing to strike out the testimony of the witness Thomas as to the threats made by the defendant, and also as to the statement of the deceased. The former was the best recollection of the witness as to what the defendant said, and the latter was a declaration of the deceased made at the time and during the affray, and was, therefore, a part of the *res gestæ*, and admissible as such.

Another assignment of error is the use, by the court, in its charge to the jury, of the expression, "enormous bodily harm," in connection with the danger which defendant must reasonably have apprehended before he was justified in taking the life of Suter. The defendant objects to this expression on the ground that, under the facts as he claimed them to be, if he had reasonable ground to believe that he was in danger of death or great bodily harm, and, under such belief, killed Suter, he was justified, and, that the expression, "enormous bodily harm," was calculated to lead the jury to believe that the danger to be feared must be more serious than great bodily harm. The term "death or great bodily harm," is the ordinary language of the books, although there are to be found expressions in which the word enormous is used; but since this case must go back for a new trial, it is unnecessary for us to determine at this time whether "enormous" is synonymous with "great," when used in this connection, but it is proper to suggest in the language of the supreme court of Tennessee, in a case in which it was held error to use the word "enormous" in place of "great," that

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"When the path is plain and well marked by long and constant travel, it is always safe to pursue it, while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken, and well-understood expressions of what the law is": *McDonald v. State*, 99 Tenn. 161 (14 S. W. Rep. 487).

The judgment is therefore REVERSED, and the case remanded for a new trial.

[Decided April 27, 1893.]

HISLOP v. MOLDENHAUER.

[S. C. 32 Pac. Rep. 1026.]

1. TIME FOR FILING OBJECTIONS TO COST BILL.—Objections to a cost bill should not be entertained after the lapse of five months from the two days limited by section 556, Hill's Code, for filing such objections, unless it is shown that the delay resulted from mistake, inadvertence, surprise, or excusable neglect.
2. APPEAL—JOURNAL ENTRY.—The recitals of a journal entry as to the day on which a judgment was rendered cannot be contradicted in the supreme court by a certified memorandum kept by the clerk of the trial court.

Multnomah County: E. D. SHATTUCK, Judge.

This was an action of forcible entry and detainer by Thomas Hislop against W. J. Moldenhauer, and is now here on the third appeal. The first appeal is reported in 21 Or. 208, and the second in 23 Or. 119. Some five months after the cost bill of defendant had been filed, the plaintiff moved to correct certain errors in the costs as taxed, and the question was urged on the second appeal, but as the record was not complete, the court refused to consider it: 23 Or. 122. After the mandate had been entered on the second appeal, the objections to the cost bill were renewed, and were in every particular allowed on the ground that the services for which the fees were claimed had never been rendered, thus reducing the costs by some

Per Curiam.

ninety dollars. Plaintiff insists that the judgment was actually taken in the lower court on May 20, 1892, but by the neglect of the attorney to furnish the proper entry to the clerk, was written into the journal under date of May 24, 1892, and in support of his claim produces the affidavit of the clerk, showing such to be the case. The defendant insists that the date in the journal must control; that the cost bill, having been filed on May 28, 1892, was within the limit of the statute; and that the plaintiff should have objected to it within two days. No order was asked, or effort made, to correct the date of the journal entry. Defendant appeals. Reversed.

John Ditchburn, for Appellant.

John H. Hall, for Respondent.

OPINION PER CURIAM.

1. Where a judgment for costs and disbursements is rendered in favor of the defendant, and a cost bill in due form is filed within the time allowed by law, and no objection filed or made thereto within two days thereafter, it is error for the trial court to permit objections to such cost bill to be filed five months thereafter, without a showing that the failure to file objections within the two days allowed by law was through the plaintiff's mistake, inadvertence, surprise, or excusable neglect.

2. A journal entry reciting that a judgment was rendered and entered on the twenty-fourth of May, 1892, cannot be contradicted in this court by a memorandum kept by the clerk and certified by him indicating that it was actually rendered on the twentieth of the month.

REVERSED.

Statement of the case.

[Argued March 27; decided April 27, 1893.]

WEISS v. MEYER.

[S. C. 32 Pac. Rep. 1025.]

1. **VACATING JUDGMENT FOR COSTS**—CODE, § 102.—A party may, under the liberal language of section 102, Hill's Code, be relieved from a judgment for costs and disbursements entered against him if it shall appear that it was entered through mistake, inadvertence, surprise, or excusable neglect.
2. **FILING OBJECTIONS TO COST BILL—DISCRETION OF COURT.**—Where the affidavit of the party seeking relief shows that no objections to the bill of costs and disbursements were filed within the time prescribed by law because of the illness of his counsel, there was no abuse of discretion on the part of the trial court in allowing the objections to be filed after the expiration of the statutory time.
3. **DISBURSEMENTS—EXPENSE OF SURVEY OR PLAT.***—The expense of making a survey of land in controversy in a case, or preparing a plat thereof, for the use of one of the parties is not a "disbursement" within the meaning of section 553, Hill's Code.

Multnomah County: ERASMUS D. SHATTUCK, Judge.

Gottlieb Weiss and Karl Kuch brought an action against Emanuel Meyer, which involved the question of how much land was included within a given description, and in preparing his case the defendant employed a surveyor to examine and plat the ground. The plaintiffs having been nonsuited, the defendant filed his cost bill, and included therein an item of seventy-five dollars for the survey and plat. Some thirty days afterward the plaintiffs moved for permission to file objections to the cost bill, and filed an affidavit showing the sickness of their

*NOTE.—This decision accords with the general holding on the same point: *Ela v. Knoz*, 46 N. H. 16 (88 Am. Dec. 179); *Hughes v. Providence R. R. Co.* 2 R. I. 494; *Caldwell v. Miller*, 46 Pa. St. 233; *Haynes v. Mosher*, 15 How. Pr. 216; *Mark v. City of Buffalo*, 87 N. Y. 185; *Miller v. Highland Ditch Co.* 27 Pac. Rep. 536. The same rule applies to the payment of expert accountants: *Faulkner v. Hendy*, 21 Pac. Rep. 754; *Miller v. Highland Ditch Co.* 27 Pac. Rep. 536; *Rathbone v. Neal*, 4 La. Ann. 563 (50 Am. Dec. 579); *McDonald v. Burke*, 2 Idaho, 995 (35 Am. St. Rep. 276; 28 Pac. Rep. 440.)—REPORTER.

Per Curiam.

attorney immediately after the trial. The objections were heard, and the surveyor's fee disallowed. Defendant appeals. Affirmed.

Milton W. Smith (*Walter S. Perry* on the brief), for Appellant.

No appearance or brief for Respondent.

PER CURIAM.—The questions arising on this appeal will be discussed in the order presented in appellant's brief:—

1. Can the court relieve a party from a judgment entered against him for costs and disbursements, through his excusable neglect in not filing objections to the cost bill within the time prescribed by law? It seems to us this question is answered in the affirmative by section 102 of Hill's Code, which provides that "the court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or such other act to be done after the time limited by this Code, or by an order enlarge such time; * * * and may, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

2. Was there an abuse of discretion by the trial court in vacating the judgment entered against the plaintiffs for costs and disbursements, and allowing objections to be filed to the cost bill in this case? We think not. The affidavit in behalf of plaintiffs shows that the reason no objections to defendant's bill of costs and disbursements were filed within the time prescribed by law was on account of the illness of plaintiffs' counsel, and though the affidavit is not as full and complete as it should perhaps have been, yet we are unable to say that there was an abuse of discretion on the part of the trial court in allow-

Statement of the case.

ing the objections to be filed. The question was largely within the discretion of the trial court, and is reversible here only for an abuse of that discretion.

3. Was there error of the trial court in refusing to allow an item of seventy-five dollars, claimed to have been paid by the defendant to one A. J. Adams for surveying and making a plat of the land in controversy? We are clearly of the opinion that this item was no more necessary as a "disbursement," within the meaning of the statute (section 553), than clerical service in the preparation of the pleadings, or the board and expenses of himself or counsel while attending the trial, or any other expense incident to a trial, and for which the law does not contemplate there shall be a charge against the adverse party.

The judgment of the court will therefore be **AFFIRMED**

[Argued April 12, 1893; decided April 27, 1893.]

EXON v. DANCKE.

[S. C. 32 Pac. Rep. 1045.]

POSSESSION OF REAL PROPERTY AS NOTICE TO PURCHASER.—It is a general rule that open, notorious, and exclusive possession and occupation of land by a stranger to the title is sufficient to put a purchaser from a vendor who is out of possession upon inquiry as to the legal and equitable rights of the party in possession: *Stannis v. Nicholson*, 2 Or. 333; *Bohlman v. Coffin*, 4 Or. 313; *Petrain v. Kiernan*, 23 Or. 455, cited and approved.

DEED ABSOLUTE IN FORM—NOTICE—UNRECORDED DEFEASANCE.—Continued possession of land by the grantor in an absolute recorded deed thereof is not notice to a *bona fide* purchaser from the grantee in the deed of the grantor's equity under an unrecorded defeasance, within the meaning of section 3029, Hill's Code.

Multnomah County: **LOYAL B. STEARNS**, Judge.

Suit by Hannah C. Exon against Michael Dancke and Adelaide, his wife, to declare a deed to be a mortgage, and for leave to redeem. The matter was referred to Geo. A.

24	110
130	173
24	110
33	340
24	110
134	490
24	110
39	214
24	110
40	40
24	110
943	391

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Brodie, Esq., who reported in favor of the defendants, and a decree was entered accordingly, from which the plaintiff appeals. Affirmed.

John F. Caples, and Greenbury W. Allen, for Appellant.

Benton Killin, Warren E. Thomas, and Reuben S. Strahan (F. A. E. Starr on the brief), for Respondents.

MR. JUSTICE BEAN delivered the opinion of the court.

This is a suit to declare a deed, absolute in form, to be a mortgage, and for leave to redeem. The facts are that on April 30, 1885, H. C. Carmack, John Kenworthy, C. C. Hall, and John S. Simmons, at the request of John Exon, the husband of plaintiff, borrowed of the First National Bank of East Portland, on their individual note, the sum of one thousand and fifty dollars, and delivered the same to Exon to enable him to pay off and discharge certain indebtedness of his then due and owing. In order to secure and save them harmless from any loss by reason of having given this note, the plaintiff and her husband made, executed, and delivered to them a warranty deed for the premises in controversy, which belonged to plaintiff, and upon which there was at the time a mortgage for about one thousand two hundred dollars in favor of one Percy, which deed was duly recorded in the records of Multnomah County. At the time of the execution and delivery of the deed, Carmack, Kenworthy, Hall, and Simmons executed and delivered to John Exon, the husband of plaintiff, a defeasance, or instrument in writing, by the terms of which they agreed that in the event of Exon's paying, or causing to be paid, their said note and interest, according to its terms, with all taxes assessed on the land, and in all things saving them harmless by reason of making the note, they would reconvey the premises to Exon or his assigns, but this defeasance was not recorded. The plaintiff remained in the open, exclusive, and notorious

Opinion of the court—BEAN, J.

possession of the premises from the date of the deed until the twenty-seventh of September, 1886, when, the note to the bank not having been paid, Kenworthy and his associates sold and conveyed the property to the defendant Michael Dancke for the sum of two thousand seven hundred dollars in cash, that being the best sum obtainable therefor, which they applied in payment of the note to the bank, and the first mortgage on the property, delivering the surplus to the plaintiff's son for her use and benefit. On the twenty-sixth of the following month Dancke took possession of the property, and has continued to live upon and occupy the same ever since. From the evidence it appears that at the time Dancke purchased he had actual knowledge that plaintiff was in the open, notorious, and exclusive possession of the property; but a careful examination of the record fails to disclose that he had any knowledge or notice of her claim thereto, unless he is chargeable with notice from her possession. He made his contract for the purchase of the property in good faith, with Kenworthy, in whom he had confidence, and who represented to him that the title was good, and that he was authorized to make the sale, but did not disclose the manner in which he and his associates became the owners of the property, or that Mrs. Exon or any other person had any interest therein, or claim thereto, but assured him that the title was good and that a deed from him and his associates would convey a perfect title.

Assuming, but without deciding, that the conveyance from plaintiff and her husband to Kenworthy and his associates, as between themselves, was a mortgage, and not a conditional deed, we shall proceed to examine the only question we deem material in the case, and that is, whether the possession by plaintiff at the time of the purchase by Dancke was sufficient to put him upon inquiry as to her equitable title, or charge him with notice of her claim to the property. By section 3029 of Hill's Code, it

Opinion of the court—BEAN, J.

is provided that "When a deed purports to be an absolute conveyance in terms, but is made, or intended to be made, defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded in the office for the recording of deeds and mortgages of the county where the lands lie." This statute is, in substance, found in many of the states of the Union, and the construction of the term "actual notice," as used therein, has been the subject of much judicial controversy and conflict of opinion. We do not deem it necessary at this time to indicate our views thereon, but shall assume the true rule to be, that notice, within the meaning of the statute, must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would "put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict, with that which he is about to purchase": *Brinkman v. Jones*, 44 Wis. 499, which contains an exhaustive and able examination of the question.

As a general rule the authorities declare that open, notorious, and exclusive possession and occupation of real estate by a stranger to the title is sufficient to put a purchaser from a vendor out of possession upon inquiry as to the legal and equitable rights of the party in possession: *Stannis v. Nicholson*, 2 Or. 333; *Bohlman v. Coffin*, 4 Or. 313; *Petrain v. Kiernan*, 23 Or. 455 (32 Pac. Rep. 158.) But whether this rule applies to a purchaser from a vendee whose vendor remains in possession, after having put upon record a deed conveying the title, properly executed, acknowledged, and recorded, the authorities are in conflict. In *Pell v. McElroy*, 36 Cal. 268, which is a leading case upon the subject, the court discusses the question at

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length, and arrives at the conclusion that the continued possession of the vendor, after the conveyance of the title, is a fact in conflict with the legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to subject the purchaser to the general rule as to the effect of notice given by possession. As a reason for this conclusion the court says: "An absolute deed divests the grantor, not only of his legal title, but right of possession; and when such grantor is found in the exclusive possession of the granted premises long after the delivery of his deed, here is a fact antagonistic to the fact and legal effect of the deed; and we cannot appreciate the justice, sound reasoning, or policy of a rule which would authorize a subsequent purchaser, while such fact of possession continues, to give controlling prominence to the fact and legal effect of the deed, in utter disregard of the other notorious prominent antagonistic fact of exclusive possession in the original grantor. He cannot be regarded as a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case." And there are other authorities which maintain this to be the correct doctrine: *Brinkman v. Jones*, 44 Wis. 498; *New v. Wheaton*, 24 Minn. 406; *Hopkins v. Garrard*, 7 B. Mon. 312; *Grimstone v. Carter*, 3 Paige, 420 (24 Am. Dec. 230); *I. C. R. R. Co. v. McCulloch*, 59 Ill. 166; 2 Devlin, Deeds, §§ 764, 765.

We are of the opinion, however, that the reason, as well as the decided preponderance, of the authorities is to the effect that a purchaser from a vendee whose vendor remains in possession, is not bound to inquire further as to the title, when he finds on record a deed from such ven-

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dor, properly conveying the title to the person from whom he is about to purchase. Any inquiry suggested by such possession is fully answered by the record, and is prosecuted sufficiently far when the examination of the record discloses a deed from the person in possession to the person who offers to sell, and who is claiming and asserting title under such deed. In Massachusetts, under a statute similar to that of this state, the supreme court has repeatedly held that the open and notorious possession by the grantor will not be sufficient to impart to the purchaser notice of an unrecorded defeasance: *Pomroy v. Stevens*, 11 Met. 244; *Hennessey v. Andrews*, 6 Cush. 170; *Newhall v. Pierce*, 5 Pick. 450; *Parker v. Osgood*, 3 Allen, 487; *Lamb v. Pierce*, 113 Mass. 72. In *Bloomer v. Henderson*, 8 Mich. 404 (77 Am. Dec. 452), Mr. Justice CHRISTIANCY, after adverting to the fact that open and peaceable possession by a stranger to the title is notice to the world of the possessor's legal and equitable rights, says: "But the object of the law in holding such possession constructive notice, where it has been so held, is to protect the possessor from the acts of others who do not derive their title from him; not to protect him against his own acts, and especially against his own deed. If a party executes and delivers to another a solemn deed of conveyance of the land itself, and suffers that deed to go upon record, he says to all the world, 'whatever right I have, or may have claimed to have, in this land, I have conveyed to my grantee; and though I am yet in possession, it is for a temporary purpose, without claim of right, and merely as a tenant at sufferance to my grantee.' This is the natural inference to be drawn from the recorded deed, and in the minds of all men would be calculated to dispense with the necessity of further inquiry upon the point. All presumption of right, or claim of right, is rebutted by his own act and deed. One of the main objects of the registry law would be defeated by any other rule." So in *Van Keuren v. Central*

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R. R. Co. 38 N. J. Law, 167, VAN SYCKEL, J., while admitting the full force of the general rule of notice by possession, declares that "this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive upon that subject; having declared, by his conveyance, that he makes no reservation, he is estopped from setting up any secret arrangement by which his grant is impaired. The well-settled rule applies to this case, that a party is estopped from impeaching or contradicting his own deed, or denying that he granted the premises which his deed purports to convey.

And in *Crasson v. Swoveland*, 22 Ind. 434, under a statute identical with ours, in discussing the question now before us, the court said: "But it is claimed that as it was found that Swoveland was in possession of the land at the time Whitney purchased it, this was constructive notice. As a general proposition the doctrine that possession of real estate is constructive notice to all the world of the rights of the parties in possession, is conceded. But the doctrine has no application to the case before us. * * * Our statute on the subject of registry * * * requires actual notice to defeat a purchaser where the defeasance has not been duly recorded. Possession has never been held anything more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: 'Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him which is not recorded': 1 Wash. R. P. § 22." In *McCulloch v. Cowher*, 5 Watts & Serg. 427, it is held that possession of land is notice of every title under which the occupant claims it, unless he has put upon record a title inconsistent with this possession. Mr. Bigelow, in

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his excellent work on *The Law of Fraud*, page 393, says that "The rule of notice by possession does not apply in favor of a vendor remaining in possession after an absolute conveyance, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive. Having declared by his deed that he makes no reservation, he cannot afterwards set up any secret arrangement by which his grant is impaired." In *Eylar v. Eylar*, 60 Tex. 315, the court declares that the sole office which possession performs in the matter of notice is to put a person desiring to purchase upon inquiry, and that it has no effect in determining what the inquiry shall be, or of whom it shall be made; and "if the inquiry is prosecuted to the highest source which the law of the land declares shall exist for the determination of title, and to the source which the parties have created as the highest evidence of their respective rights, can it be true that it is further necessary to examine sources inferior and make inquiry as to whether or not there are claims, or even rights, in others not evidenced as the law requires, or otherwise the purchaser be charged with constructive notice of secret vices in the title which he buys? To so hold, we are of the opinion, would be to strike at the very foundation of the policy upon which the registration laws rest." As bearing upon the discussion of this question, and in effect declaring the same rule as the authorities heretofore cited, see 16 Am. & Eng. Enc. 803; *Humphrey v. Hurd*, 29 Mich. 44; *Tuttle v. Churchman*, 74 Ind. 311; *Brophy M. Co. v. Brophy M. Co.* 15 Nev. 101; *Scott v. Gallagher*, 14 S. & R. 332 (16 Am. Dec. 508); *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126; *Bingham v. Kirkland*, 34 N. J. E. 230; *Koon v. Tramel*, 71 Iowa, 132 (32 N. W. Rep. 243); *Cook v. Travis*, 20 N. Y. 400.

Upon a review of the whole case, in the light of the authorities, we are of the opinion that Dancke, in the

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absence of actual notice of plaintiff's equity, had a right to rely upon her deed of record to Kenworthy and his associates, and to assume that she continued in possession of the premises in subordination to the title of her vendees. He is, therefore, entitled to the protection of a *bona fide* purchaser for value, and the decree must be AFFIRMED.

[Argued April 3, 1893; decided April 27, 1893.]

GRAFTON v. CITY OF SELLWOOD.

[S. C. 32 Pac. Rep. 1026.]

CONTRACT WITH MUNICIPAL CORPORATION.—When the mode of procedure regarding a contract with a municipal corporation is especially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will be void.

PUBLICATION OF ORDINANCES.—When ordinances are required to be published before they shall go into effect, this requirement is essential and the publication must be in the designated mode.

Multnomah County: E. D. SHATTUCK, Judge.

Action by Jacob A. Grafton and L. T. Proctor, partners as Grafton & Proctor, against the City of Sellwood, to recover damages for breach of a contract for the erection by plaintiffs of a city hall and jail for defendant. From a judgment for defendant, plaintiffs appeal. Affirmed.

Berryman M. Smith (*Victor K. Strode* and *Chas. N. Wait* on the brief), for Appellants.

William H. Adams, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

This action was brought by the appellants to recover seven hundred dollars damages on account of an alleged breach of contract. The plaintiffs, in substance, allege that the defendant, prior to January 2, 1892, duly levied a

Opinion of the court—MOORE, J.

special tax of three mills on all the taxable property within its limits, amounting to one thousand two hundred dollars, or more, for the purpose of erecting a city hall and jail, and collected about six hundred dollars of said tax; that on December 28, 1891, an ordinance was duly passed and approved which authorized the proper officers of the defendant to enter into a contract with plaintiffs for the erection of said city hall and jail; that on January 2, 1892, in pursuance of said ordinance, a contract was entered into between the parties, whereby plaintiffs agreed to furnish the material and erect said building for one thousand one hundred and seventy-five dollars; that plaintiffs immediately commenced the erection thereof and expended in labor and material thereon four hundred dollars, when, on January 6, 1892, the defendant, by an ordinance, repealed the ordinance of December 28, 1891, rescinded the contract of January 2, 1892, and notified the plaintiffs thereof, by reason of which they were obliged to abandon the same, and thereby lost the profits on said building amounting to three hundred dollars; that all the ordinances in relation to the levy of said tax, and authorizing the defendant to enter into said contract, were duly posted as provided by law, and duly went into force and effect.

The defendant denies the material allegations of the complaint, and for a separate answer alleges that the ordinance approved December 28, 1891, was not posted until December 31, 1891, and did not go into effect until January 3, 1892, one day after the execution of the alleged contract; that plaintiffs had not, at the time they were so notified, furnished any material or labor thereon. For a second separate defense the defendant alleged that prior to the execution of plaintiffs' alleged contract, defendant had entered into a contract for lighting the city for a term of five years at seventy-five dollars per month, amounting to four thousand five hundred dollars; that it had also purchased a fire engine for nine hundred and fifty dollars,

Opinion of the court—MOORE, J.

and given a negotiable bond therefor, and that its charter only permitted an indebtedness of one thousand dollars to be incurred. Plaintiffs moved the court to strike out the separate defenses, which motion was overruled by the court, and they were given ten days to reply, but failing to do so, judgment was rendered against them for costs and disbursements, from which they appeal.

The appeal presents but one question,—did the answer contain a defense which entitled the defendant to a judgment for want of a reply? It is only necessary to consider one of these defenses, as we think that is decisive of the case. The complaint alleges that the ordinance of December 28, 1891, had been duly posted as provided by law, and duly went into force and effect, but it does not allege that it was in force at the time the contract was executed, on January 2, 1892, while the answer directly alleges that said ordinance was not in force at that time. Subdivision 18 of section 28 of the charter of Sellwood, filed in the office of the secretary of state, February 25, 1889 (Session Laws, 1889, p. 503), gives the council power "to provide for the erection of a city jail." Section 29 provides that the power and authority given the council by section 38 can only be enforced and exercised by ordinance, unless otherwise expressly provided. Section 28 contains forty-one subdivisions giving power to the council. Section 29 probably refers to section 28 instead of section 38, which relates to the manner of taking an appeal from the action of the council to the circuit court. No jail could be erected without an ordinance for that purpose. When the mode of procedure is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation: Dillon, Municipal Corporations, § 449. Section 14 provides that within three days after the passage of an ordinance, copies of the same shall be posted in at least three public places in said city, and all such ordinances shall take effect within five days

Points decided.

after such notice unless otherwise ordered. "When ordinances are required to be published before they shall go into effect, this requirement is essential and the publication must be in the designated mode": Dillon, Municipal Corporations, § 331. The time when the ordinance of December 28, 1891, took effect was a question of fact. Any contract entered into prior to that time would be void under the charter. The answer presented an issue upon this question of fact, and, in default of a reply thereto, the court was authorized to render judgment against plaintiffs, and the judgment appealed from must therefore be **AFFIRMED.**

[Decided April 27, 1893.]

THE VICTORIAN.

SMITH v. OREGON SHORT LINE RY. CO.

[8. C. 82 Pac. Rep. 1040.]

1. **PARTIES TO AN APPEAL—JURISDICTION—CODE, § 537.**—Every party is "an adverse party," within the meaning of section 537, Hill's Code, whose interests in relation to the judgment or decree appealed from are in conflict with the modification or reversal sought by the appeal: *Lilienthal v. Caravita*, 15 Or. 341, cited and approved.
2. **IDEM.**—In an action to enforce a lien against a vessel, where the claimant files a bond with sureties to obtain its release, and judgment is rendered against both the claimant and the sureties, the claimant need not serve notice of its appeal on the sureties, since their interests are identical with those of the claimant.
3. **CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS TO ENFORCE A LIEN FOR BUILDING VESSELS—CODE, § 3690.**—Under section 9 of the Judiciary Act of 1789, the district courts of the United States have exclusive jurisdiction of all maritime causes of action, but a contract for furnishing materials in constructing a domestic vessel is not a maritime contract: therefore, section 3690, Hill's Code, is constitutional and valid in so far as it gives the state courts jurisdiction to enforce by a proceeding *in rem* the lien given by the state law for materials used in constructing domestic vessels, nor is it of any consequence that all or part of the materials were furnished after the vessel was launched.
4. **STATUTE OF LIMITATIONS—BOAT LIENS—ACCOUNTS—CODE, § 3706.**—Where materials are furnished from time to time as they are needed in

24	121
24	181
32*	1040
33*	409

24	121
26	196
32*	1040
41*	1108

24	121
28	117
28	304
28	306
28	344

24	121
130	296

24	121
82	836

24	121
34	343

24	121
36	404

24	121
87	235

24	121
48	526

Argument of counsel.

the construction of a vessel, and several payments are made on account, all the items constitute one continuous account, and the limitation of one year provided by section 3706, Hill's Code, for enforcing a lien for such materials, does not begin to run against each item as it was furnished, but begins from the date of the last item.

5. **FRIVOLOUS PLEADING.**—The test of frivolousness in pleading is whether or not it introvertibly so appears from the mere reading of it; if so, then it is frivolous, but if argument is required to show that the pleading is bad, it is not frivolous.*
6. **MOTION TO STRIKE OUT—DEMURRER.**—The proper way to test the sufficiency of a pleading is by a demurrer and not by a motion to strike out.
7. **BOAT LIEN—PAYMENT TO CONTRACTOR.**—Under statutes like section 3690, Hill's Code, providing that every vessel built in the state shall be liable to a lien for all debts due to persons on account of material used in the construction of the same, the right to a lien is determined solely by the furnishing of the material—and this is in no wise affected by the terms of the contract between the owner and contractor, or by the fact that the contractor may have been fully paid.

Multnomah County: E. D. SHATTUCK, Judge.

Action by W. K. Smith, A. I. Smith, W. V. Smith, and P. C. Smith, doing business under the firm name of Smith Bros. & Co., against the boat Victorian, the Oregon Short Line & Utah Northern Railway Company, claimant, to enforce a material man's lien. From a judgment for plaintiffs, claimant appeals. **AFFIRMED.**

William W. Cotton and Zera Snow, for Appellant.

Sections 3692 to 3706 of the boat lien law relating to the remedy are unconstitutional and void, being in contravention of the provisions of the United States statutes conferring upon the admiralty courts of the United States exclusive jurisdiction of proceedings *in rem* to enforce liens arising out of torts or contracts falling within the jurisdiction of admiralty. By the ninth section of the judicial act of 1789, now found in paragraph 8 of section

*Section 75. Sham, frivolous, and irrelevant answers and defences may be stricken out on motion. Section 85. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party.

Argument of counsel.

563 of the revised statutes of the United States, the district courts of the United States have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of the common-law remedy where the common law is competent to give it. As a proceeding *in rem* is not a common-law remedy, the United States supreme court has repeatedly held that state courts have no jurisdiction of any proceedings *in rem* against a vessel arising upon any cause of action which falls within the jurisdiction of the admiralty courts; and that in all such cases, the original jurisdiction of the United States district court of such proceedings *in rem* was exclusive: *The Moses Taylor*, 4 Wallace, 411; *The Hine v. Trevor*, 4 Wallace, 555; *The Belfast*, 7 Wallace, 625.

The subjects of admiralty jurisdiction are maritime contracts and maritime torts: *The Belfast*, 7 Wallace, 637; *Ins. Co. v. Dunham*, 11 Wallace, 1. Contracts for repairs, supplies and materials furnished to a vessel, are all maritime contracts, and all such contracts, except when performed in the home port of the vessel, give rise to a maritime lien even in the absence of statute: *The Virgin*, 8 Peters, 538; *The Hiram Dixon*, 33 Fed. Rep. 297; *The Georgia*, 32 Fed. Rep. 637; *Clyde v. Steam Transportation Co.* 36 Fed. Rep. 501. A contract performed wholly upon land for work done or material or labor furnished in the building of structure upon the land, is not a maritime contract.

The court erred in receiving evidence against the objections of the defendant in regard to the furnishing of lumber and building material to Steffen more than a year prior to the commencement of the action; and erred in entering up judgment against the defendant for the value of such lumber and building material found by the referee to have been furnished to Steffen and used in the construction of the boat more than a year prior to the commencement of the action. One of the limitations upon the

Argument of counsel.

plaintiffs' lien and the action for its enforcement is that found in section 3706, Hill's Code, reading as follows: "All actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action accrued." A provision of this kind in a statute creating a new right or a new remedy is not a limitation simply upon the remedy which would be recognized, only when it is the law of the forum, but is a limitation upon a right and will be recognized in all forums, and is not waived if not pleaded, is not subject to the exemptions that effect the general statutes of limitation, and no disability can toll it: *Buswell, Limitations*, § 531; *Jones, Liens*, § 1732; *The City of Salem* (Dist. Or.) 31 Fed. 616.

Earl C. Bronaugh and Wm. D. Fenton (Lewis L. McArthur and Earl C. Bronaugh, Jr., on the brief), for Respondents.

The contract sued on is not a maritime contract, and is therefore not enforceable in the federal courts. See the following in addition to the cases cited by the court: *Mott v. Lansing*, 57 N. Y. 115; *The Lottawana*, 21 Wall. 558; *The Tug Montauk v. Walker*, 47 Ill. 337; *Ferry Co. v. Beers*, 20 How. 400; *The Scow M. Tuttle v. Buck*, 23 Ohio St. 566.

Admiralty does not have jurisdiction unless the libellant has a lien under a maritime contract, or a local law, and a mere lien under a local law will not confer jurisdiction. The contract must also be maritime: *The Pacific*, 9 Fed. Rep. 120; *Sheppard v. Steele*, 43 N. Y. 52, 56; *Brookman v. Hammell*, 43 N. Y. 554; *Keating v. Spink*, 62 Am. Dec. 214, note 238; *Walters v. The Steamboat Mollie Dosier*, 95 Am. Dec. 722, note 737; *Boylan v. Steamboat Victory*, 40 Mo. 252, 236; *Mitchell v. The Steamboat Magnolia*, 45 Mo. 67; *Burke Mfg. Co. v. Steamboat*, 42 Mo. Ap. 93; *The Manhattan*, 46 Fed. Rep. 707.

While this account is not an open, mutual and current

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account, in the strict sense of that term, because there are no demands in favor of Steffen, but merely payments made, yet it is certainly a running account, and the statute of limitations as between plaintiffs and Steffen would not begin to run until the date of the last item, and the claim would not be barred until six years from that date. As between the plaintiffs and the boat, the statute would not begin to run until the date of the last item, and would not be barred until more than one year had elapsed after such date, or after the completion or launching of the vessel: *Chamberlain v. Ouyler*, 9 Wend. 127; *Skyrme v. Occidental Mining Co.* 8 Nev. 237; *Singerly v. Doer*, 62 Pa. St. 12; *Fitch v. Baker*, 23 Conn. 567; *Mathews v. Brewing Co.* 19 S. W. Rep. 150.

The account in this case was a running account and constituted but one entire demand; the cause of action therefore accrued at the date of the last item: *Stine v. Austin*, 9 Mo. 259; *Steamboat Mary Blane v. Beehler*, 12 Mo. 477; *Carson v. Steamboat Daniel Hillman*, 16 Mo. 257; *Boylan v. Steamboat Victory*, 40 Mo. 251; *Fulton Iron Works v. Smelting Co.* 80 Mo. 269; *Mellor v. Valentine*, 3 Col. 258; *Jones v. Swan*, 21 Iowa, 185; *Lamb v. Hanneman*, 40 Iowa, 43; *Iowa Mty. Co. v. Shanquest*, 70 Iowa, 124 (29 N. W. Rep. 820); *Smith v. Velie*, 60 N. Y. 111; *Bartel v. Mathias*, 19 Or. 487. Each item in the account is not to be regarded as a separate cause of action, but rather the whole as a continuous dealing, the aggregate of the items being included in the same cause of action for which one lien is given: 2 Jones, Liens, §§ 1433, 1431.

It appears from the complaint that the account here sued on is a running account, and that this is so fairly inferable from the conduct of the parties at the time the contract was made, and from the subject matter of the contract. If from such conduct and subject matter it appears that the whole account was to be regarded as one transaction, the lien would relate to and take effect from the

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date of the last item so as to support the lien for the entire account: *Central Trust Co. v. Texas & St. Louis Railway Co.* 23 Fed. Rep. 673; *Ring v. Jamison*, 66 Mo. 428; *St. Paul, etc. v. Stout*, 47 N. W. Rep. 974 (Minn.); *Chester Rolling Mills, etc.* 6 N. Y. Sup. 215.

The fact that the contractor, Steffen, may have been paid in full is no defense against the lien of plaintiffs, but the answer does not aver payment in full. The owner must see at his peril that all the material men, sub-contractors and laborers are paid in full, and the amount due upon the contract is not the limit of their recovery: *Spokane Mfg. Co. v. McChesney*, 21 Pac. Rep. 198; S. C. 1 Wash. St. 609; *Henry & Coatsworth Co. v. Evans*, 10 S. W. Rep. 868; S. C. 97 Mo. 47; *Atwood v. Williams*, 40 Me. 411; *Ainslie v. Kohn*, 16 Or. 371; *Allen v. Rowe*, 19 Or. 19; *City of Salem*, 7 Sawyer, 481; *Albright v. Smith*, 51 N. W. Rep. 590 (S. D.); *Bardwell v. Mann*, 48 N. W. Rep. 1120 (Minn.); *Laird v. Moonan*, 32 Minn. 358.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. This is an action brought against the defendant boat Victorian, under the provisions of the boat lien law (sections 3690 *et seq.*), to enforce a lien for materials alleged to have been furnished by the plaintiffs to one J. F. Steffen, and to have been used by him as a contractor in the construction of the defendant boat. The record discloses that the sheriff of Multnomah County seized the boat, whereupon the Oregon Short Line Ry. Co., as defendant and claimant, filed its undertaking as provided by section 3698 of Hill's Code, with D. P. Thompson and J. W. Troupe as sureties, and obtained its release and thereafter appeared in the action as such defendant and claimant. After trial the court rendered a judgment against the boat Victorian, and, also, under section 3701 of Hill's Code, against the defendant company and its sureties in the undertaking.

From this judgment the defendant company has appealed, but neither D. P. Thompson nor J. W. Troupe has joined in the appeal, nor has it served notice of such appeal upon them, or either of them. Upon this state of the case, plaintiffs have moved to dismiss the appeal, upon the ground that Thompson and Troupe are so connected in the judgment, and would be so affected by its modification or reversal, that they are as to the plaintiffs or defendants an "adverse party," within the meaning of the statute in relation to appeals, and, therefore, necessary parties to give the appellate court jurisdiction to revise or reverse it. Our Code provides that "any party to a judgment or decree * * * may appeal," and that "the party appealing is known as the appellant, and the adverse party as the respondent": Section 536. "Any party" evidently refers to any person who is a party to the action. To take an appeal it is required that "the appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon, with the clerk": Section 537. Who, then, is "an adverse party," within the meaning of those provisions of the Code, upon whom the notice of appeal must be served? Evidently every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal. Such has been declared to be the meaning of the words "adverse party" as used in the statutes of other states: *Thompson v. Elsworth*, 1 Barb. Ch. 627; *Cotes v. Carroll*, 28 How. Pr. 436; *Hiscock v. Phelps*, 2 Lans. 106; *Wheeler v. Hartshorn*, 40 Wis. 96; *Senter v. De Bernal*, 38 Cal. 640; *Lillienthal v. Caravita*, 15 Or. 341 (15 Pac. Rep. 280).

2. The notice must be served on all parties whose interests are adverse to the party appealing. The question, then, is whether Thompson and Troupe, who have not appealed from the judgment, are to be deemed adverse parties so as to require them to be served with notice of

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the appeal. They certainly have no interests in the case which are adverse to, or in conflict with, those of the appellant. The judgment is against them and the appellant, as well as the boat, for a specific sum of money. Its modification or reversal would affect them precisely as it would affect the appellant, indicating that its and their interests are identical, and not adverse. The party interested in sustaining the judgment or decree is an adverse party to the appellant, and, as such, is entitled to notice of the appeal. Thompson and Troupe are not interested in sustaining, but in defeating, the judgment, and are not parties whose interests are in conflict with, or adverse to the party appealing. "Our Code," says SANDERSON, J., "allows any and every party who is aggrieved to appeal without joining any one else, no matter what may be the character of the judgment against him, whether joint or several, and, in this respect, works a change from the former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former, also": *Senter v. De Bernal*, 38 Cal. 642. Thompson and Troupe are not parties "who are interested in opposing the relief which the appellant seeks by his appeal," and, therefore, it is not required to notify them. When, of parties who are interested in opposing the relief sought by the appeal, some are, and others are not, served, the appeal will prove ineffectual when the relief sought is of such character that it cannot be granted to those served without being granted as to those not served. As Thompson and Troupe were not interested in sustaining the judgment from which the appeal is brought, they are not "an adverse party" within the meaning of the statute, and consequently are not entitled to notice of appeal.

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3. The next objection involves the right of the court to enforce the lien by a proceeding *in rem*. It is founded upon the assumption that the lien sought to be enforced arose out of a maritime contract, and constituted, therefore, a maritime cause of action. By the ninth section of the judiciary act of 1789 the districts courts of the United States are invested with the exclusive jurisdiction of all maritime causes of action, saving to suitors in all cases the right of the common-law remedy where the common law is competent to give it. The contention is that the common-law remedy thus saved to suitors does not extend to the enforcement of liens by a proceeding *in rem*, and, consequently, that a cause of action arising out of a maritime contract belongs exclusively to the admiralty jurisdiction. The action was brought under section 3690, to enforce a lien on the boat *Victorian* for materials alleged to have been furnished to and used by the contractor in the construction of such boat. The findings show that the boat was launched before it was completed, and some of such materials were furnished and used after it was launched, but before it was completed. When the action was commenced the boat had not been enrolled or licensed, though application had been made to the proper authorities to have it enrolled and licensed under the name "*Victorian*." The lien given under our subdivision 2 of section 3690 is almost identical with that given under section 14 of the Massachusetts statute, and under either statute such lien may be enforced by a proceeding *in rem*. In *Atlantic Works v. The Glide*, 157 Mass. 525 (33 N. E. Rep. 163), the jurisdiction of the courts of a state to enforce liens by a proceeding *in rem* for labor and materials furnished in repairing domestic vessels was thoroughly examined and upheld. As the court was divided, the case is especially valuable in presenting the authorities and the reasons for and against the exercise of such jurisdiction by state courts. But we are not concerned with the validity of the juris-

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diction where it is exercised to enforce a lien for labor or materials furnished in repairing domestic vessels. As FIELD, J., said: "We do not find it necessary to determine whether, under the existing decisions of the Supreme Court of the United States, and the existing admiralty rules, this court has jurisdiction to enforce a lien created by the statutes of the state for materials used or labor performed in repairing a domestic vessel": *McDonald v. The Nimbus*, 137 Mass. 363. It may be conceded that the weight of judicial authority is opposed to the exercise of such jurisdiction by the state courts in cases of that kind, without affecting the validity of its exercise in cases of this kind, unless the provisions in relation to them, contained in the statute, are so inseparably connected that one cannot stand without the other. But this is not so. The lien given for materials furnished or labor done in repairing vessels is distinct and separate from that given for the building or construction of vessels, and a denial of the power of the court to enforce a lien in the first case in no way involves or affects the power of the court to enforce the lien in the latter.

In *Sheppard v. Steele*, 43 N. Y. 56 (3 Am. Rep. 660), the lien and its enforcement in the state courts for materials furnished in the construction of a boat was upheld notwithstanding previously in *The Josephine*, 39 N. Y. 19, the enforcement of a lien for supplies furnished a domestic vessel at her home port was denied, and the same statute in that regard declared to be void, upon the ground that these different matters, although contained in the same statute, were not so blended, or one so dependent on the other, as to render the whole statute inoperative or void. Nor will we assume that a statute is void in part in order to defeat a right involved under another part. We regard the act and its amendment as one statute. We test the right claimed under it by viewing the statute as a whole. We construe them together as one statute. That a statute

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which gives a lien upon vessels and furnishes a means of enforcing it, in cases of contracts not maritime, is valid, is not now open to question; and that contracts for the building of vessels or ships, or for labor performed or materials furnished in their construction, are not maritime contracts, and not cognizable in admiralty, is affirmed by the whole current of judicial authority, both federal and state. In *Roach v. Chapman*, 22 How. 129, the suit was brought to enforce a claim for a part of the price of machinery furnished in the construction of a steamboat, and it was held that the contract out of which the claim arose was not maritime. Mr. Justice GREER, in delivering the unanimous opinion of the court, said: "A contract for building a ship, or supplying engines, timber, or other material for her construction is clearly not a maritime contract. Any former dicta or decisions which seem to favor a contrary doctrine were overruled by this court in *People's Ferry v. Beers*, 20 How. 393": *The Belfast*, 7 Wall. 624; *Edwards v. Elliott*, 21 Wall. 553; *The Orpheus*, 2 Cliff. 29; *The Norway*, 3 Ben. 165; *Smith v. The Royal George*, 1 Woods, 293. In *The Busted*, 100 Mass. 409, under a statute like our own, FOSTER, J., said: "The statutes of this commonwealth giving a lien on a ship or vessel for labor performed and materials furnished in its construction, are regarded by this court as constitutional and valid enactments, and have been recognized to be so in numerous decisions": *Stinton v. The Roberts*, 34 Ind. 448 (7 Am. Rep. 229); *Sheppard v. Steele*, 43 N. Y. 52 (3 Am. Rep. 660); *Thorsen v. The Martin*, 26 Wis. 488 (7 Am. Rep. 91); *Scull v. Shakspear*, 75 Pa. St. 297; *Edwards v. Elliott*, 34 N. J. L. 96. So that we reach the question which we are required to decide, holding, at least, that the statute is valid and operative in so far as it gives a lien for labor performed or materials furnished in the construction of ships or vessels, and provides for its enforcement by a proceeding *in rem*.

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The inquiry, then, is whether, upon the facts, the contract is maritime. If it is, the cause of action arising out of it falls within the exclusive jurisdiction of the admiralty courts; on the other hand, if the contract out of which the cause of action arose is not a maritime contract, the cause is one of which the admiralty courts have no jurisdiction. The fact that some of the materials were furnished after the boat was launched and afloat is the only circumstance that can be relied upon to class the contract as maritime. This is upon the hypothesis that the materials furnished after a boat or vessel is afloat, though for its completion, make the contract maritime, and consequently, that the contract is not to be performed on land. It is true that contracts relating to commerce and navigation are classed as maritime contracts; but the simple fact that an incomplete or unfinished vessel has been launched into the water when a contract relating to her completion is made, in no way fixes or determines its character. In such case the work performed or the material furnished is in constructing the boat or vessel, and to bring her into existence as a complete entity. There is a marked difference between furnishing materials to a vessel already in existence, and furnishing them to bring one into existence. The latter are for her construction, and the contract is not maritime. The idea is that the vessel, when completed, will be used for maritime purposes, but until then she is in the process of construction,—a structure under state control,—and a claim for materials furnished, though she may be afloat, is not a maritime, but a land contract. The fact, therefore, that the work was done, or the material furnished, after the vessel was launched, does not *per se*, as the cases show, render the contract maritime. In *Wilson v. Lawrence*, 82 N. Y. 411, the vessel was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as a part of and to complete the work of construction. The question was whether

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the furnishing of sails after launching was a land contract or one purely maritime. The court held that it was a land contract, and that the lien attached. FINCH, J., said: "It is doubtless true that, before launching, the contracts for construction are more easily and strongly shown to be land contracts, but no case holds that the work of building or constructing a vessel cannot proceed after the launch. Indeed no case could hold that, for it is purely a question of fact. A vessel may be unfinished when launched, and the work of building may continue while she is in the water. * * * In *Roach v. Chapman*, 22 How. 129, the court held that 'a contract for building a ship, or supplying engines, timber, or other material for her construction is clearly not a maritime contract.' If an engine is an essential part of the construction of a vessel propelled by steam, why are not the sails an essential part of the construction of a sailing vessel? Is the ship without these necessary aids any more built or constructed in the one case than the other? * * * We are satisfied that the contract in this case was a land contract and that the lien attached." In *McDonald v. The Nimbus*, 137 Mass. 360, FIELD, J., said: "The facts show that the materials furnished in this case were furnished in the construction of the vessel. She was not so far constructed as to be fitted for sea and used as a commercial vessel after her arrival in Gloucester": *Baizley v. The Odorilla*, 121 Pa. St. 233 (1 L. R. A. 505; 15 Atl. Rep. 521).

In the case of *The Iosco*, Brown's Adm. 495, a hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped and the vessel put in condition for navigation, and it was held that the work was done in the building of a vessel, and that admiralty had no jurisdiction. Mr. Justice LONGYEAR said: "What libellants did and furnished were clearly by way of completing the construction of the vessel, and consti-

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tuted in no sense, within the meaning of the maritime law, repairs and materials, for which by that law an action *in rem* will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. Neither is there anything in the position of libellants' advocate that the schooner had to all intents and purposes assumed the position and liabilities of a vessel, by taking in and transporting freight on her trip from Alabaster to Bay City, and that therefore what was done and furnished to and for her at the latter place by libellants, must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But even if this were otherwise, the position could not be maintained, because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction, and that the taking on of the flour, etc., was a barely incidental matter." In *The Count De Lesseps*, 17 Fed. Rep. 461, the claim was for materials, consisting of a derrick, buckets, and other dredging machinery furnished at Philadelphia after the vessel had been towed from New Jersey where she had been built, to fit out the vessel for an intended voyage to Panama, and it was held that they were furnished in the original construction of the boat: *The Pacific*, 9 Fed. Rep. 124; *Collis v. Coernine*, 7 Am. Law, Reg. 5; *Smith v. The Royal George*, 1 Woods, 293; *The Norway*, 3 Ben. 163. These cases show that a claim for work done, or materials furnished, in the building or original construction of a vessel is not a maritime contract, and that admiralty has no jurisdiction. The claims are not maritime when they are for original construction or equipment, whether or not the boat has been launched. It is the usual mode in the building of steamers, to build the

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hull, and to place the engines, boilers, and machinery in it after the launching, so as to avoid the additional weight of the machinery in the process of launching. When the work done, or the material furnished, is used in the construction of the vessel, and to bring her into existence as an entity, the claim does not arise out of a maritime contract, and it is competent for the state courts to enforce it by a proceeding *in rem*.

4. The next objection involves the statute of limitations. Section 3706 provides that "All actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action accrued." The record discloses that the defendant reserved exceptions to all evidence relating to materials furnished and used in the vessel more than a year prior to the commencement of the action. The contention is, as to such items, that the cause of action accrued more than one year prior to its commencement, and, therefore, within section 3706, the plaintiff had no lien as to such items, or a cause of action upon them. The facts show that the plaintiff furnished the material from time to time as it was needed for use in the construction of the boat, and that there were several payments made on the account during the interim. The mode of dealing between the parties indicates a running account during the process of the building of the boat. Each item was added to the account at intervals, according as it was ordered and furnished, and the aggregate of items, so furnished, constitutes the claim, less the credits, for the materials furnished in the construction of the boat. The claim was a running account for materials which passed into the vessel permanently during the progress of its construction. All the items in the account relate to one transaction,—the building of the boat,—and constitute it a continuous account, regardless of intervening balances. In such case it seems to us that the furnishing of the materials should be

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deemed a continuous account, rather than as independent transactions. It is different when the various transactions are separate and independent, and there are payments of some one or more of them without regard to the others. To sustain the contention of the defendant, we must consider each item in the account as a separate and distinct transaction, constituting an independent cause of action, and necessitating its commencement against the boat, in order to save the lien, within one year after the sale of each item, notwithstanding the items in the account were for materials furnished for the same general purpose, namely, the construction of the boat, and stand related to it as one transaction. Nor do we think there is anything in the *City of Salem*, 31 Fed. Rep. 616, in conflict with this doctrine. The language of Mr. Justice DEADY, that "whenever a check or order of the owners was paid, under the statute giving a lien, such payment constituted a cause of action, and unless asserted or enforced within a year the lien is lost," indicates that he regarded such payment as a separate and distinct transaction. The statement of facts is meager, and this inference is more reasonable than the other. This result is decisive of other objections that were raised under section 3706, and eliminates their consideration from the case.

5. The next objection relates to errors assigned in striking out on motion portions of the second amended answer. So far as the motion went to matters already in issue by the denials in the answer, there was no error. The grounds of the motion were, that the answer, in the particular specified, was sham, frivolous, and irrelevant. The provisions of the Code in reference to such motions are found in sections 75 and 85 of Hill's compilation. Of two separate defenses contained in the answer, one is alleged as a defense, and the other as a partial defense, to the cause of action. The first was struck out, as appears from the motion, on the ground that "the matters and

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things therein alleged are sham, frivolous, irrelevant, and immaterial, and do not constitute a defense or counter-claim to the cause of action"; and the second was struck out for like reasons. The error complained of is that the motion was used to test the sufficiency of these defenses instead of a demurrer. Counsel for the plaintiffs concede that if the defenses named had been separately pleaded, and had been complete in themselves, the better practice would have been to reach the objection by demurrer. It is insisted, however, that if the defenses stricken out in the answer failed to state facts constituting a defense, partial or otherwise, the defendant claimant has sustained no prejudice, and that the proof of them could not make a defense. There can be no doubt that the object of a motion to strike out is not to perform the office of a demurrer. There are many decisions to the effect that an answer may be insufficient in form or substance without being frivolous. To be frivolous it must appear so incontrovertibly from the mere reading or bare statement of it. If an argument is required to show that the pleading is bad, it is not frivolous. RYAN, C. J., said: "When it needs argument to prove that an answer is frivolous, it is not frivolous and should not be stricken out. To warrant this summary mode of disposing of the defense, the mere reading of the pleading should be sufficient to disclose, without debate and beyond doubt, that the defense is sham and irrelevant": *Cattrill v. Cramer*, 40 Wis. 555.

6. So, too, it is held that where there is a semblance of a cause of action or defense set up in the pleading, its sufficiency cannot be determined on motion to strike it out as redundant or irrelevant. In *Walter v. Fowler*, 85 N. Y. 625, it is said: "There is a semblance of a cause of action stated in the answer. Whether it was a valid counter-claim within the Code, is a question which should be determined either by demurrer or by motion on the trial, and not by a summary motion to strike it out as

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redundant or irrelevant. The two remedies are not concurrent." And again: "It may very well be that this constitutes in law no defense, but the sufficiency of a defense cannot be determined on a motion to strike out a pleading. To reach such a defect is the appropriate office of a demurrer." It must be conceded, then, that the proper mode to test the sufficiency of a cause of action or defense is by demurrer. Nor is there any doubt but that the rule should be enforced, unless it is manifest that the defense, upon its face, is clearly insufficient in law, and can serve no other purpose than to delay the litigation. We are unwilling to say that the bare inspection of these defenses in the answer warrants us in declaring them to be frivolous, but we are satisfied that they are untenable, and plainly so. The motion has been treated as a demurrer, and so argued to us, and it will only unnecessarily prolong the litigation for us to delay our decision. In view of these considerations, we have concluded it is better to treat the motion as a demurrer, and pass upon the defenses with the hope that our decision may not lead to any relaxation of the proper practice in such cases.

7. Our statute (section 3690) provides that "every boat or vessel * * * constructed in this state * * * shall be liable and subject to a lien * * * for all debts due to persons by virtue of a contract express or implied, with the owners of a boat or vessel, or with the agents, contractors, or sub-contractors of such owner, or any of them, or with any person having them employed to construct * * * such boat or vessel on account of labor done or materials furnished by mechanics, tradesmen or others, in the building * * * such boat or vessel." The contract of the owner with the contractor necessarily authorizes the contractor to procure materials to construct the boat. This being so, he was authorized to contract with the plaintiffs to furnish the material necessary to be used in the construction of the boat. The plaintiffs allege that at the

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instance of the contractor they furnished materials which were used in the construction of the boat, and that they thereby acquired a lien thereon for the amount specified. The defendant seeks to defeat the lien by alleging that it was agreed between the company and Steffen, by the contract, that it should pay to him a certain sum therein named for all the work done and materials furnished in the construction of the hull of the steamboat, and that "such amount should be in full of all claims of any kind whatsoever against the hull of the said boat." It is also alleged that payments were made to the contractor as provided in the contract, and that there was nothing due him at the time of the commencement of the action.

It is claimed that the allegation that it was a part of the contract that the payments so made should be in full of all claims of any kind whatsoever is fatal to the lien of the plaintiffs. The statute gives the lien upon furnishing the materials as a means of securing payment therefor. The language is that the "boat shall be liable and subject to a lien" for a debt due the material man by virtue of a contract express or implied with the contractor on account of materials furnished in the building of such boat. The intent of the legislature that the material man shall have a lien on the boat or vessel is plainly and definitely declared, nor is there any suggestion of implied conditions or limitations to the right of lien as thus given. Hence, as BARCLAY, J., well said: "We have no right to assume, without more, that the statute thereby meant to say that such a lien should only exist when the owner had not fully paid the contractor, and in no wise for more than the original contract price": *Henry Coatsworth Co. v. Evans*, 97 Mo. 47 (3 L. R. A. 332; 10 S. W. Rep. 868). The lien is an incident which the law attaches to the transaction, and can be waived or discharged only by an agreement or understanding to that effect on the part of the person entitled to it. In the *City of Salem*, 7 Saw. 481 (10 Fed. Rep.

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843), Mr. Justice DEADY, in construing this identical statute, said: "It matters not, so far as the claims of the libellants are concerned, what controversy exists between Steffen and his contractors, or how the respondent is involved in it, whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value,—irrespective of the state of the accounts between him and Steffen,—and are entitled to maintain this suit to establish their claim, and enforce such lien by the sale of the boat." The statute makes the boat' liable to the lien of the laborer or material man, if he complies with the statute, notwithstanding the owner has paid the contractor. In *Atwood v. Williams*, 40 Me. 409, the laborer's lien was enforced, though the contractor had been previously paid. "The aim of the law," as BARCLAY, J., said, "is to protect those whose material or labor has enhanced the value of property, against the business misfortunes or possible frauds of any middle-man, at whose instance they furnished the same. It is made the interest of the owner, for the protection of his property from liens, to see that all valid debts of that nature are discharged by those who incur them. The law makers considered that with the exercise of ordinary prudence, the owner would be in a better position to guard against loss under this law than sub-contractors would be without the law. The owner may stipulate with the contractor to defer his payment until the time has passed for filing other liens, or to pay the sub-contractors himself, or he may take security or any other suitable steps that circumstances may require for the protection of himself, and of those whose labor and materials enter into the building, upon its credit": *Ainslie v. Kohn*, 16 Or. 371 (19 Pac. Rep. 97); *Laird v. Moonan*, 32 Minn. 358 (20 N. W. Rep. 354); *Lonkey v. Cook*, 15 Nev. 58; *Albright v. Smith*, 51 N. W. Rep. 590; *Bardwell v. Mann*, 46 Minn. 285 (48 N. W. Rep. 1120); *Spokane Mfg. Co. v. McChesney*, 1

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Wash. St. 609 (21 Pac. Rep. 198). These authorities lead to the conclusion that laborers or material men are not affected by the state of the account between the owner and contractor.

The judgment is **AFFIRMED**.

[Argued April 23, 1893; decided June 19, 1893.]

STATE v. BAKER COUNTY.

[8. C. 33 Pac. Rep. 530.]

1. ACTION AGAINST A COUNTY—SECTIONS 350 AND 2239.—In Oregon the authority to maintain an action against a county on an obligation created by law is not derived from section 350, but exists independently of it; and this section must be construed in connection with section 2239, which subjects a county to a suit or action on account of any matter arising out of its corporate obligations, whether created by contract or otherwise: *Grant Co. v. Lake Co.* 17 Or, 453, cited and approved.
2. CLAIM OF STATE FOR TAXES—CORPORATE OBLIGATION OF COUNTY.—The general scheme of assessing, levying, and collecting state taxes* in Oregon creates the relation of debtor and creditor between the state and each county; and, no particular remedy having been provided for enforcing the obligation, a law action will lie against any county for its proportion of the state tax: *Multnomah Co. v. State*, 1 Or. 359; *Gilliam Co. v. Wasco Co.* 14 Or. 525, and *Grant Co. v. Lake Co.* 17 Or. 453, cited and approved. The liability of a county for its proportion of the state tax is a "corporate obligation" for which it may be sued under section 2239, Hill's Code.
3. LIMITATIONS OF ACTIONS BY STATE TO RECOVER TAXES—CODE, § 6.—The obligation of a county to pay its proportion of the state taxes is entirely a creature of statute, and is consequently "a liability created by statute" within the meaning of subdivision 2, section 6, Hill's Code, requiring an action on such a liability to be brought within six years.

Baker County: JAS. A. FEE, Judge.

Action by the State of Oregon against Baker County to recover unpaid state taxes. Judgment for defendant on a general demurrer to the complaint, from which plaintiff appeals. **Reversed**.

*See sections 2783, 2789, 2790, 2791, 2813, Hill's Code, and Laws, 1885, page 135.

24	141
28	406
24	141
31	530
24	141
186	120
24	141
46	36

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Geo. E. Chamberlain, attorney-general, for the State.

M. L. Olmstead (*J. E. Courtney* on the brief), for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

This action was commenced early in 1892 to recover the unpaid balance of the state taxes charged and apportioned to Baker County during the years 1879 to 1885 inclusive, and from 1889 to 1891 inclusive. The complaint contains ten counts, or causes of action, and in each count all the facts necessary to show the liability of the county are alleged. To the first six causes of action a demurrer was interposed on the ground that they were barred by the statute of limitations, and to the entire complaint a demurrer, which was sustained by the court below, on the ground that the plaintiffs had no capacity to sue, and for want of jurisdiction of the subject matter.

1. In support of the ruling of the court below it is contended that this action cannot be maintained because of section 350 of Hill's Code, which provides that "An action may be maintained against any of the organized counties of this state upon a contract made by such county in its corporate character, and within the scope of its authority, and not otherwise." In *Grant Co. v. Lake Co.* 17 Or. 453 (21 Pac. Rep. 447), this court had occasion to consider the effect of this section, and it was therein held that the authority to maintain an action against a county on an obligation created by law is not derived from said section, but exists independently of it, and that section 350 must be construed in connection with section 2239, which subjects a county to a suit or action on account of any matters arising out of its corporate obligations, whether created by contract or otherwise. If, therefore, the duty of Baker County to pay its proportion of the state taxes is a corporate obligation imposed upon it by law, it is clear,

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under the decision referred to, that this action can be maintained; and this brings us to the principal question in the case.

2. It is contended for the defendant that there is no corporate obligation on the part of the county to pay the amount of state taxes apportioned to it, but that the remedy of the state is against the treasurer of the county, whose duty it is to pay the amount so apportioned, and not against the county in its corporate capacity. So far as the taxes accruing prior to the act of February 26, 1885, are concerned, this question was in effect decided adversely to the defendant's contention in *Multnomah Co. v. State*, 1 Or. 359. In that case it was held that the law created the relation of debtor and creditor between the several counties and the state, and as no particular remedy was provided for enforcing the obligation, it would necessarily follow that an action at law is the proper remedy. The act of 1885 (Laws of 1885, 135) does not, it seems to us, change this relationship, but only the mode of ascertaining the amount to be paid by the several counties. To hold that under this act the counties of the state are not severally made liable for the amount of state taxes assessed upon the property within them, would be doing violence to both the spirit and letter of the law.

After making provisions for ascertaining the property in each county subject to taxation, and the value thereof, the law requires the county clerk to transmit to the secretary of state a certified copy of the assessment roll (section 2788), and the governor, secretary of state, and state treasurer, acting jointly, immediately after receiving the abstracts of the assessment rolls of the several counties, ascertain by computation, in a specified manner, the total amount of revenue necessary for state purposes, with the resulting rate of taxation, and apportion the total revenue among the several counties according to the amount of real and personal property subject to taxation therein

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(section 2789), to be paid to the state treasurer in gold and silver coin, out of the first moneys collected and paid into the county treasury (section 2813), without any deduction or abatement on account of delinquent taxpayers (section 2791), and to be levied and collected in each county in the manner other taxes are levied and collected. (Section 2790.) All this points clearly to the county as the principal debtor. It would be difficult to find language more expressive of the legislative intent and purpose to make the counties liable in their corporate capacity for the amount of the state tax apportioned to each. The state does not deal with the individual taxpayers, or assume any responsibility for the collection of the tax, but deals with the county only. The revenue of the state is apportioned among the counties to be paid by them in proportion to the taxable property in each.

This is the basis upon which the amount payable by each county is to be ascertained. The primary liability belongs to the counties, and the state looks to them alone for its revenue. The means afforded them to raise the money with which to discharge this duty is given by providing that it shall be levied and collected in each of said counties in the manner other taxes are levied and collected. The machinery for raising and collecting taxes is exclusively under the control of the counties, and vested in officers in whose election or appointment the state has no voice, and for whose acts it is in no way responsible. It imposes upon each of the several counties the burden of contributing a just proportion of the expenses of the state government, at the same time providing it with the means of raising the funds with which to discharge the obligation, and holds the county responsible for the entire amount so apportioned, whether collected or not. While there is no provision in the law as it now stands, directing or requiring the state treasurer to charge the several counties with the amount so apportioned, yet the effect of the

law is to create the relation of debtor and creditor between the counties and the state: *County of Schuylkill v. Commonwealth*, 35 Pa. St. 524; *Supervisors v. St. Clair Co.* 30 Mich 388.

But it is argued that a tax is not a debt which can be enforced by action, or upon which a promise to pay can be implied. It may be admitted that, as between the sovereign and the taxpayer, a tax is not, in a technical sense, a debt which can be collected by suit or action, unless the law so provides, either expressly or impliedly. But if the obligation of the several counties in this state to contribute, in proportion to the taxable property within them, to the expenses of the state government, can be said to be a tax within the meaning of the rule above indicated, no means are provided by law for its enforcement except the general provisions authorizing the state to sue, and the county to be sued; and no rule is better settled than the one stated by Mr. Justice STORY, that "By the common law an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arises from contract, or be created by statute, and the remedy as well lies for the government itself as for a citizen; and where the debt arises by statute an action or information of debt is the appropriate remedy, unless a different remedy be prescribed by statute": *U. S. v. Lyman*, 1 Mason, 498; *Gilliam Co. v. Wasco Co.* 14 Or. 525 (13 Pac. Rep. 324); *Grant Co. v. Lake Co.* 17 Or. 453 (21 Pac. Rep. 442); *Savings Bank v. United States*, 19 Wall. 227.

3. The next objection involves the statute of limitations. For the purposes of this case the statute provides that "an action upon a contract or liability, express or implied," or "upon a liability created by statute, other than a penalty or forfeiture," shall be commenced within six years, and for any other cause of action within ten years, after the cause of action shall have accrued (sections 6 and 11), and that these limitations shall apply to actions

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brought in the name of the state. (Section 13.) It is manifest that this is not an action upon a contract express or implied; and the question then presented is whether it is an action upon a liability created by statute, and therefore barred within six years, or a cause of action not otherwise provided for, and therefore not barred for ten years. The test as to whether a liability is one created by statute is said to be "whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether, independently of the statute, the right of action exists for a breach of the duty or obligation imposed by the state": Wood, Limitations, § 39. If so, then the liability is not one created by statute; but if it is an obligation imposed wholly by statute, and without which it does not exist, it is then a liability created by statute, and in this state is barred within six years: *Higley v. Calaveras County*, 18 Cal. 176; *Chase v. Lord*, 16 Hun. 369; *Richards v. Wyandotte County*, 28 Kan. 326; *Shepherd v. Hills*, 25 Law J. Exch. 6.

Within this rule it seems clear that the duty or obligation of a county to contribute or pay its proportion of the state taxes is wholly a liability created by statute. Independently of the statute the law implies no obligation whatever upon a county to do that which the statute requires to be done, and except for the statute there would be no liability or right of action. The obligation of a county to contribute its proportion of the state taxes is entirely a creature of the statute, and exists only by virtue thereof, and is consequently a liability created by statute, within the provisions of subdivision 2 of section 6. And since the legislature has thought proper to provide that the statute of limitations shall apply to actions brought in the name of the state, in the same manner as to actions by private parties, it follows that if the state fails to prosecute its demand for the period during which the claim of a private individual is protected, it must suffer the same consequences.

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The judgment of the court below must be REVERSED and the cause remanded for further proceedings not inconsistent with this opinion.

[Argued April 4, 1893; decided June 19, 1893.]

QUINN v. GROSS.

[S. C. 33 Pac. Rep. 535.]

24	147
30	357
24	147
42	30
24	147
45	265

1. **PRINCIPAL AND AGENT—LIMITATION OF ACTION.**—A cause of action does not accrue in favor of a principal against an agent until the expiration of the time fixed by the terms of the agency, or a demand by the principal.
2. **IDEM.**—A claim by a daughter against the estate of her father for the proceeds of land sold by him seventeen years before his death, under a power of attorney appointing him her agent to sell her real property and care for the proceeds, is not barred by the statute of limitations until the statutory period after the termination of the agency, or after notification by the agent to the daughter that the proceeds of the sale were at her disposal.
3. **SUFFICIENCY OF EVIDENCE—CODE, § 1134.**—Where, in an action by a daughter against her father's executor to establish a rejected claim against his estate, she introduces in evidence a power of attorney from her to her father to sell certain real estate and to manage the proceeds thereof, and a deed showing such sale by him for a designated amount nearly twenty years before; and testifies herself that he had sent her only a few dollars, she has made out a sufficient case under Hill's Code, § 1134, providing that no rejected claim shall be allowed except upon competent evidence other than the testimony of the claimant.
4. **PRINCIPAL AND AGENT—SUFFICIENCY OF EVIDENCE.**—In an action by a principal to recover money collected by an agent, it is sufficient to show the agency, the collection of the money, and that the principal had no knowledge of this until within the statutory period of limitation; there need not have been any affirmative act of concealment by the agent, it is sufficient that the principal did not know of the collection.

Multnomah County: E. D. SHATTUCK, Judge.

This is an action brought by Mary Quinn against the Right Reverend Archbishop Gross, as executor of the last will of Terence Quinn, deceased, to establish a claim of seven thousand dollars against his estate. The record discloses

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that the plaintiff is the daughter of Terence Quinn and Mary Quinn, his wife; that on March 7, 1854, Mary died intestate, leaving plaintiff her sole surviving heir; that at the time of her death she was seized of certain real property in the City of Portland, which plaintiff inherited; that plaintiff's father kept her at school in California from the time she was six years old until she became of age, and that on December 26, 1871, and soon after attaining her majority, at her father's solicitation, she executed and delivered to him a general power of attorney, which authorized him to sell and convey the real property which she had inherited from her mother, and manage the proceeds, without any restrictions whatever; that in 1874, plaintiff went from California to New York, where she remained until about September 1, 1890, when she came to Oregon; that her father, on September 15, 1873, under the said power of attorney, in consideration of seven thousand dollars, sold and conveyed her real property to W. S. Ladd; that her father died September 4, 1890, leaving a will wherein defendant was named as executor, and in which his property was devised to plaintiff, his sisters, and others. The plaintiff alleges that she was ignorant of her estate in Oregon, and relied upon her father for information, and that he, taking advantage of the confidence reposed in him by reason of their relationship, fraudulently kept her in ignorance of the condition of her property, and of his receiving any money on account of its sale, and fraudulently misinformed her concerning the facts, and that she only discovered the sale and receipt of the money by her father since his death, and hence failed to demand the same during his lifetime; that by reason of the said sale of her land and conversion of the proceeds said estate became indebted to her in the sum of seven thousand dollars; that on February 28, 1891, she duly presented her claim to the defendant for allowance and that he rejected it. The defendant for a separate answer pleaded the statute of limi-

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tations, and that whatever money had been received by the testator was with the knowledge and consent of the plaintiff. The case was tried before a jury which rendered a verdict in favor of plaintiff for the amount of her claim, and from the judgment thereon the defendant appeals, and assigns as errors the failure of the court to sustain a motion for a nonsuit, the admission of certain evidence, and the giving and refusing to give certain instructions. Affirmed.

William Foley, and *Franklin P. Mays* (*Arthur L. Frazer* on the brief), for Appellant.

William W. Page, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

The appellant contends that the motion for a nonsuit should have been allowed, because, *first*, no case was made to prevent the statute from running; and, *second*, there was no competent evidence to establish plaintiff's claim.

1. It is a well-established principle of law that a cause of action against an agent does not accrue until demand is made: *Buswell, Limitations*, § 323. In *Taylor v. Bates*, 6 Cow. 376, it was held that an attorney was not liable to an action for money collected for another, till demand made, or directions to remit, and that he was not in default till he received orders from his principal. In *Leake v. Sutherland*, 25 Ark. 219, it was held that the agent was not bound to account to the principal until a time fixed by the stipulation of his agency, or a demand made by the principal. It is the duty of an attorney or agent who has collected money on account of his client or principal, to give notice within a reasonable time of the fact: *Story, Agency*, § 208. When the principal has received such notice he is bound to make demand for it within a reasonable time; and if he omits to do so, he puts the statute in motion, and when he suffers the time which it

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limits to expire without bringing suit, is concluded by his laches: *Jett v. Hempstead*, 25 Ark. 463. In *State v. Sims*, 76 Ind. 328, it was held that the principal's money in the agent's hands was, in the absence of any allegation of proof, presumed to have been lawfully collected; and that before it could be recovered from the agent a demand must have been made, which must be alleged and proved. If the money was unlawfully collected, however, no demand was necessary. A distinction seems to be made between general and special agents. If the agency be general or continuing, the statute would not commence to run until the termination of the agency; but if the agency were special, and related to special transactions, in regard to which the agent had received special authority, then the statute would begin to run from each transaction: *Hopkins v. Hopkins*, 53 Am. Dec. 664.

2. Applying these rules to the case at bar, it appears that the plaintiff by her power of attorney appointed her father as her agent to dispose of her property in Oregon and elsewhere, and to manage and care for the proceeds thereof. This instrument, by its terms, made the testator the general agent of the plaintiff. The agency was a continuing one, and the statute would not commence to run until it was terminated, or until the agent had notified the principal that the proceeds of the sale of her property were at her disposal, and then, if she failed to demand it within the statutory period, her right of action would be barred. The agency being general and continuing, the money received by the testator on account of the sale of plaintiff's land must, in the absence of proof of the termination of such agency, be considered as held by him for her use and benefit.

3. The record shows that before this action was commenced the plaintiff had demanded the allowance of her claim, which had been denied, and this demand she alleges and proves. Section 1134, Hill's Code, provides that no

claim which shall have been rejected shall be allowed by any court except upon competent evidence other than the testimony of the claimant. The record shows that plaintiff introduced in evidence copies of the following records: The United States patent to her mother; her power of attorney to her father; and the deed to W. S. Ladd. She then offered in evidence letters from her father to her, and testified that since the execution of the power of attorney he had sent her only forty-seven dollars. When the plaintiff had established the agency, and the sale of her property by the agent, she had made her case, and the burden then shifted to the defendant to show that the agency had been terminated more than six years prior to the commencement of the action: *Jett v. Hempstead*, 25 Ark. 463. The defendant having offered no testimony upon that subject, it is clear that the plaintiff's claim was established by competent evidence without her testimony.

4. The instruction of the court to the jury, that "In general, when an agent has transacted business for his principal, especially when he has received money belonging to his principal, he should make report of those facts at the earliest convenient time to the principal, unless there is something in the agreement between them which excuses the agent from rendering such account; and at all events it is the duty of the agent, when a demand is made by the principal for an account, or for the payment of money received by him, to respond according to the nature of the demand; and if he fails to do so, he cannot claim the benefit of the statute of limitations unless the conduct of the principal may have been such as to excuse him. But in order that the principal may be subject to the operation of the statute upon his claim, he must have had knowledge, either by direct notice from the agent, or by some other means, of the facts that the agent has received money and holds it for his benefit," clearly enunciates the law applicable to the case; and the refusal of the following

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instruction,—“Before you can find for the plaintiff in this cause you must not only believe that the land was sold by Quinn as alleged, and that he kept the purchase price, but you must also believe that the plaintiff did not know of such sale as she alleged, and further, that she was prevented from getting knowledge of such sale by some wrongful act done by Terence Quinn,”—asked by the defendant, was correct. The agency being a continuing one, plaintiff had a right to expect that in case her property had been sold the proceeds were being managed by her father for her benefit.

The judgment of the court below will be **AFFIRMED**.

94	152
329	168

[Argued June 7; decided June 26; rehearing denied July 24, 1893.]

JOSHUA HENDY MACHINE WORKS v. PACIFIC CABLE CO.

[S. C. 83 Pac. Rep. 408.]

MECHANICS' LIEN—NOTICE—VARIANCE.—A notice of lien must correctly describe the property on which the lien is claimed. No lien can be enforced on lots in “Carter's Addition to Portland” when the notice described the property as lots in “Market Street Addition to Portland,”—there is a fatal variance between the claim and the proof.

Multnomah County: **LOYAL B. STEARNS**, Judge.

This was a suit by the Joshua Hendy Machine Works, a corporation, to enforce a material man's lien on certain real property in the City of Portland. The Portland Cable Railway Company entered into a contract with the Pacific Cable Construction Company (called at head of the case the Pacific Cable Company), to construct a cable railway, and the Joshua Hendy Machine Works took a subcontract for furnishing the engines and pumps for the power house at the foot of Portland Heights. Some question arose about the payment for the work, and this suit was com-

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menced against the Cable Railway Company, the Construction Company, and the Portland Savings Bank as the trustee holder of certain mortgage bonds. The original notice of lien described the property sought to be charged as "Lots three (3), four (4), five (5), and six (6), in block one (1), in Carter's Addition to the City of Portland," and the same description was carried into the complaint. At the trial, it developed that some of the blocks in Carter's Addition had originally been lettered; that block B had been subdivided and replatted many years before as Market Street Addition; and that Carter's Addition and Market Street Addition each had a block one containing lots numbered three, four, five, and six. At this point, a motion in proper form was submitted to the trial court for leave to amend the description in the complaint by striking out "Carter's" and putting in its place "Market Street." This motion was supported by the certificate of the referee, to the effect that there was testimony before him tending to show that the property sought to be charged with the lien was in Market Street Addition, and not in Carter's Addition. There is a further statement in this certificate, to the effect that the power house, owned and operated by the defendant and appellant, the Portland Cable Railway Company, was situated on lots three (3), four (4), five (5), and six (6), in block one (1), of Market Street Addition to the City of Portland; that the said defendant owned no other power house in the County of Multnomah; and that the work done and material supplied under the contract referred to in the complaint was done upon and supplied for the said power house, so situated in the said Market Street Addition. This motion was allowed, and the case then proceeded to judgment, the referee finding in favor of the plaintiff upon all points; and that report, after argument upon exceptions to it, was confirmed by the trial court, and a decree entered foreclosing the lien on the lots in Market Street Addition. The Portland Savings Bank,

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holding a mortgage that was admitted to have precedence of the alleged lien, and the Cable Railway Company appeal. The Pacific Cable Construction Company, the original contractors, do not appeal. Reversed and dismissed.

Thomas N. Strong, for Portland Savings Bank.

The original notice of mechanics' lien on file in the evidence shows that it was a lien on the lots in block one, Carter's Addition, and certainly no order of court can so authorize an amendment as to make an untrue copy superior to the original, especially when the original is on file when the amendment is made. The order could not have intended any such absurdity, and certainly cannot have any such effect. This lien notice described certain lots in Carter's Addition. After the description of the land comes the description of the manner in which the demand arose, viz: "That heretofore, to wit, on the eleventh day of October, 1889, the said Joshua Hendy Machine Company made and entered into a contract with the Pacific Cable Construction Company for the building and erection of four boilers in the power house situate on the land of said Portland Cable Construction Company for an agreed price of eight thousand two hundred and ten dollars." This reference to a power house, which is no part of the description of the premises affected, but merely a description of the labor done, and the fact that the power house was situated on some land belonging to the Cable Railway Company (there is no statement that the power house is situated on these lots) is relied upon to shift this lien from block one, Carter's Addition, a well-known subdivision of land, to block one, of Market Street Addition, a different and equally well-known subdivision. In other words, the searcher of titles must disregard the direct statement of the lien notice, and must search the records to find what lands are really owned by the party sought to be charged, and must also go upon the ground and find out upon what

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tract the improvements or structures are really situated. The question naturally suggests itself, why not dispense with the lien notice entirely, and make the structure itself the notice of lien?

Ossian Franklin Paxton (*John W. Paddock* on the brief), for Portland Cable Railway Company.

The original complaint and the original notice of lien described the property sought to be charged as certain lots in Carter's Addition to Portland; that at the trial the complaint was amended so as to make the description read Market Street Addition. To support this amended complaint the plaintiff offered in evidence the original notice of lien, which was admitted over our objection. There is a fatal variance between the allegation and the proof, in that the notice describes an entirely separate and different piece of property from that described in the amended complaint.

The decree finds "that the plaintiff has a lien upon lots three (3), four (4), five (5), and six (6), in block one (1), in Market Street Addition to the City of Portland, and the power house situated thereon," and forecloses such lien. Plaintiff introduced evidence at the trial, against defendant's objections, going to show that the Portland Cable Railway Company had but one power-house, and that the same was situated upon the said lots in Market Street Addition, for the purpose of showing that the Market Street Addition property was the property intended to be described in the notice of lien. This was error on two grounds: *First*, because the original notice of lien described the lots as situated in Carter's Addition, and the description there made must stand; and, *second*, because the original notice does not claim lien on any power house. The language is that "the Joshua Hendy Machine Works * * * proposes to and does claim a lien on the following described property, to wit: Lots

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three (3), four (4), five (5), and six (6), in block one (1), in Carter's Addition to the City of Portland. * * * That the said lien is claimed on the following described property, to wit: Lots three (3), four (4), five (5), and six (6), in block one (1), in Carter's Addition to the City of Portland, * * * under our statute it is the building upon which the labor is performed or materials furnished, which is subject to the lien, with a sufficient amount of the land necessary for the use of the building. This lien notice does not claim any lien upon any building, nor describe any building, nor state that there is any building on the land described in the notice, nor that the railway company's power house is on the land described in the notice. The lien notice must not only describe the land sought to be charged, but it must also show that the building upon which the work was done is situated on the land. Failure to do this is fatal: *Warren v. Quade*, 29 Pac. Rep. 827; *Kezartee v. Marks*, 15 Or. 538.

There is a class of cases where the description does not show on its face the location of the property, and a party is permitted to show what the description means. The evidence in such cases is received, not for the purpose of importing into the writing an intention not expressed therein, but to elucidate the meaning of the words employed: 1 Am. & Eng. Enc. of Law, 532. A mere mistake is not a latent ambiguity, and when there is no latent ambiguity no extrinsic evidence can be received: *Idem*, 533.

Milton W. Smith (*Walter S. Perry* on the brief), for Joshua Hendy Machine Works.

The variance between the description set out in the claim of lien and alleged in the complaint, and the description shown in the proof, is immaterial here because the controversy is between original parties, and no new parties or rights that can be affected by the result have intervened. The owner of the land, the appellant, has not been induced

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or persuaded by the original mistake in the description to change or alter his position with reference to the lien in any manner. Even if the notice can be held bad as to contesting lienors (which we do not regard as settled law at all), it is fair and proper that it be held good as to the owners; and this upon the same principle that a deed void as to third parties by reason of a defective description is yet good as to the parties themselves. This fact, viz, that the contention is between the owner and subcontractor, and not between contesting lienors, is insisted upon in all the cases cited below; and the courts, under such circumstances, appear to find no difficulty in granting appropriate relief.

In *McLean v. Young*, 2 McArthur, 184, the description was, "lots A, B, C, D, and E, in the subdivision of original lot No. 2, in square 791, recorded in the office of the surveyor," etc. The lots sought to be charged with the lien were actually situated in square 971, and that was the square recorded at the place of reference.

In *Schmidt v. Gilson*, 14 Wis. 558, the description was, "N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 18"; when the true description was, "N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 7."

In *DeWitt v. Smith*, 63 Mo. 263, the lien, as filed, described the building as situated on "lots 19 and 20, in block 2," in a certain addition to Kansas City, the error consisting in the misdescription of the block in question, which was "20" and not "2." It being shown that the owner had no other lots in the addition named, except lots 19 and 20, in block 20, and there being no conflicting claimants to be injured by the correction, the amendment was allowed. See also *Cleverly v. Mosely*, 148 Mass. 280; *Martin v. Simmons*, 11 Cal. 411 (18 Pac. Rep. 535); *Russell v. Hayden*, 40 Minn. 88.

The supreme court of Indiana has thus clearly stated the law applicable to the description of real estate in a deed, mortgage, or claim of lien: "Where the description

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is so uncertain as to afford no reliable clue to a more definite and correct description, no title passes or lien is acquired, as the case may be; but that where the description, though too defective and insufficient of itself to identify any particular tract of land, can, nevertheless, be aided by proper averment and rendered definite and certain by the introduction of extrinsic evidence in support of such averment, it will be held to be sufficient for the purpose intended and a true description will be supplied at the hearing."

PER CURIAM.—This is a suit brought by the plaintiff to foreclose an alleged mechanics' lien. The complaint alleges that the plaintiff has a lien upon lots 3, 4, 5, and 6, in block 1, in Market Street Addition to the City of Portland. To prove this allegation, plaintiff introduced in evidence, against defendant's objection, a notice claiming a lien upon lots 3, 4, 5, and 6, in block 1, in Carter's Addition to the City of Portland, which is a different parcel of land. This is a fatal variance between the allegation and the proof. The notice of lien does not describe the property set forth in the complaint.

The decree is **REVERSED** and the **COMPLAINT DISMISSED**.

[Argued June 17, 1893; decided June 23, 1893.]

JENSEN v. FOSS.

[S. C. 33 Pac. Rep. 535.]

An assignment of error that covered the entire charge to the jury, without specifying any particular sentence or proposition on which appellant proposes to rely, is too indefinite, and presents no question for review in the supreme court. Code, § 537; *Murray v. Murray*, 6 Or. 17, and *Swift v. Mulkey*, 17 Or. 532, cited and followed.

Multnomah County: **E. D. SHATTUCK**, Judge.

Per Curiam.

This was an action by A. E. L. Jensen against J. S. Foss and others for the conversion of certain personal property alleged to belong to the plaintiff. The action was dismissed as to the defendants S. Hannum and Penumbra Kelly, but the defendants Foss and Boscow denied the conversion, and alleged title in themselves. A jury trial was regularly had and a verdict rendered in favor of plaintiff for the sum of eight hundred dollars. Defendants moved for a new trial, and the court decided that the plaintiff should accept a judgment for six hundred dollars or a new trial would be ordered. The plaintiff accepted this amount and judgment was rendered therefor, from which judgment this appeal has been taken.

John H. Hall, for Appellants.

Gilbert J. McGinn, and *J. Frank Boothe* (*Cecil Bauer* on the brief), for Respondent.

PER CURIAM.—The objection made is that the notice of appeal does not state the error upon which the defendants and appellants rely for a reversal of the judgment. The first error assigned is to the entire instruction of the court to the jury, and is too vague and general to notify the plaintiff of the particular issues to be tried on the appeal. This objection falls directly within the rule laid down in *Murray v. Murray*, 6 Or. 17, and *Swift v. Mulkey*, 17 Or. 532.

The judgment must be AFFIRMED.

Per Curiam.

[Argued June 12, 1893; decided June 27, 1893.]

GIACHETTA v. MARQUAM.

[S. C. 33 Pac. Rep. 557.]

Multnomah County: ERASMUS D. SHATTUCK, Judge.

U. S. G. Marquam, for Appellant.*John Ditchburn*, for Respondent.

PER CURIAM.—This was an action by Fortunatio Giachetta against Ulysses Simpson Grant Marquam to recover money. The complaint charges that the defendant was employed by the plaintiff as an attorney-at-law to conduct a certain action for him, and that it was agreed that defendant should have as compensation for his services one third of the amount recovered, which was the sum of seven hundred and thirty-eight dollars and thirty-three cents; that defendant refused to pay plaintiff the balance due him, amounting to the sum of four hundred and seventeen dollars and twenty-two cents, after deducting the sum of seventy-five dollars paid on behalf of plaintiff to Dr. Boies for medical treatment. The defendant by his answer admits the agreement, and that the sum of seven hundred and thirty-eight dollars and thirty-three cents was received in said action, but sets up as a defense a settlement with one Albert B. Ferrara by paying him three hundred and twenty-three dollars and sixty cents in full of all money due plaintiff, claiming that said Ferrara was the authorized agent and attorney of plaintiff. In his reply plaintiff denies that Albert B. Ferrara was his authorized agent or attorney, also any knowledge of the alleged payments. A trial was regularly had, and the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of four hundred and seventeen dollars and twenty cents. It thus appears that the main

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question in the case was one of fact, which was for the jury to determine. When the case was called in this court the appellant had not prepared his brief, and, although he was allowed five days in which to file one, he failed so to do. The entire instructions given by the court are in the record, and, taken as a whole, we think they correctly apply the law to the facts. We are unable from the record before us to discover any error substantially affecting the rights of appellant, and the judgment must be **AFFIRMED**.

[Argued June 1; decided June 27; rehearing denied July 19, 1893.]

MASTERS v. CITY OF PORTLAND.

[B. C. 33 Pac. Rep. 540.]

MUNICIPAL ASSESSMENTS—LOCAL IMPROVEMENTS.—A willful, arbitrary, and intentional omission on the part of a city council to assess a portion of the property benefited by a local improvement, placing the whole burden upon the remaining property, renders the assessment void, even though the direct benefits to the separate parcels are in excess of the assessment thereon.

CONSTITUTIONAL LAW—EQUAL TAXATION—STREET AND SEWER ASSESSMENTS.—The provision of section 1 of article 9 of the state constitution requiring a uniform and equal rate of assessment and taxation does not apply to street or sewer assessments, and assessment for these purposes in proportion to the benefits received is constitutional. *King v. Portland*, 2 Or. 146, cited and approved.

Multnomah County: **LOYAL B. STEARNS**, Judge.

This is a suit brought by William Masters, W. B. Preston, Annie Corbett, Julia D. Church, Annie F. Holland, Mary C. Roth, Jennie Porter, and Joseph Paquet to enjoin the City of Portland from collecting an assessment levied upon real property owned by them, to defray the cost of a sewer. The material facts are that on November 19, 1890, the common council of the City of Portland passed ordinance No. 6593, entitled "An ordinance declaring the pro-

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Argument of counsel.

portionate share of the cost of constructing the sewer in Thirteenth Street from the south line of Montgomery Street to the proposed main sewer in Market Street, to be assessed to the property benefited by the construction thereof, and directing an entry of such assessment in the docket of city liens as provided by section 121 of the city charter"; and in pursuance thereof made an assessment against plaintiffs' property and entered it upon said docket. It is alleged that said assessment is unequal, unjust, and arbitrary, because a large amount of property benefited by said sewer is not assessed, and that plaintiffs' property is thereby obliged to bear an unequal proportion of the cost. A list of property alleged to have been benefited by said sewer, but not assessed, is then given, and it is further alleged that the omission to assess the property upon said list was willful, arbitrary, and intentional on the part of said city, and is unjust to the plaintiffs; that the entry of said assessment in the docket of city liens casts a cloud upon the title to plaintiffs' land. Then follows a prayer for a perpetual injunction against the enforcement of said assessment. The defendant demurred to the complaint for that it did not state facts sufficient to constitute a cause of suit. The court overruled the demurrer, and, the defendant refusing to further plead, a decree was rendered as prayed for, from which the defendant appeals. Affirmed.

William T. Muir, city attorney, for Appellant.

Assessments levied upon property benefited to defray the cost of a local improvement, are in the nature of taxes, but they do not fall within the meaning of the constitutional provision requiring uniformity and equality in taxation: Oregon Const. Art. I. § 32; *King v. City of Portland*, 2 Or. 146; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Cooley's Constitutional Limitations* (5 Ed.), 619.

Complainants conceive themselves to have been injured upon considerations very unique. It is nowhere claimed

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that any of the assessments levied against the separate parcels of land are in excess of the direct benefits conferred by the improvement. The grievance seems to consist in the supposition that other property is also benefited, but is not charged with a proportion of the cost, and that still other property which is assessed, is not assessed in equal proportion to the value thereof. And it is charged that the omission to make assessments on said property not assessed was "willful, arbitrary, and intentional" on the part of the city and is unjust to the plaintiffs. The logic of the complaint is that notwithstanding the city has proceeded properly, and in no wise exceeded the authority conferred upon it by the legislature, and has not charged the plaintiffs more than the improvement benefits them, yet the assessments are invalid because the plaintiffs have a notion of their own that there is other property so situated as to realize some advantage from the sewer. This court has recently held that a property holder has no right to complain if his property is not charged an amount in excess of the benefits actually conferred by an improvement. In that case, as well as in an earlier one, this court also held that in a case like the present one, the court could not substitute its discretion in the stead of the judgment of the tribunal or body designated by the legislature for the purpose of determining the question of benefits arising from the making of an improvement.

Where an improvement directly benefits the property assessed the question of the extent of the value thereof must be determined by the proper officers of the corporation. In the absence of fraud the courts will not interfere unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it; or where the mode of levying the assessment excludes the consideration of the question of value of the improvements: *Paulson et al. v. City of Portland et al.* 16 Or. 450; *King v. City of Portland*, 2 Or. 146; *O'Reilly v. Kingston*,

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114 N. Y. 439; 10 Am. & Eng. Enc. 301; *Bigelow v. Chicago*, 90 Ills. 49; *Baltimore v. Johns*, 56 Md. 1; *Davies v. City of Saginaw*, 87 Mich. 439; *Moore v. People*, 106 Ills. 376; *Workman v. Worcester*, 118 Mass. 168; *Petition of Oruger*, 84 N. Y. 619; *Cooley*, Taxation, 662, 663; *Wray v. Pittsburgh*, 46 Pa. St. 365; *People v. Hager*, 52 Cal. 171; *Rickets v. Spraken*, 77 Ind. 371; *Re Union Ave.* 59 How. Pr. 228.

Julius C. Moreland, and *Wm. Y. Masters*, for Respondents.

The leading case upon the question of the effect of the intentional omission of property from an assessment, and one to which all the authorities upon this subject, since its rendition, refer, is that of *Weeks v. Milwaukee*, 10 Wis. 260. This was a suit to declare the assessment of the City of Milwaukee void, because of the intentional omission from the roll of certain valuable property, and the court held that omissions of property from the assessment, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxation laws is entrusted, do not necessarily vitiate the whole tax; but intentional disregard of these laws, in such manner as to impose illegal taxes upon those who are assessed, does vitiate the entire tax.

The same principle is declared in the following cases: *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *Dyar v. Farmington*, 70 Me. 515; *Simple v. Langlade Co.* 75 Wis. 234; *LeRoy v. Mayor*, 20 Johns. 430; *Henry v. Chester*, 15 Vt. 400; *Merrill v. Humphrey*, 24 Mich. 174.

MR. JUSTICE MOORE delivered the opinion of the court:

The appeal presents but one question: What is the effect of a wilful, arbitrary, and intentional omission to assess a portion of the property benefitted by a local improvement, and placing the whole burden upon the remaining property? The city charter invests the council

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with a discretion in apportioning the benefits of a local assessment, and such discretion, when honestly exercised, cannot be reviewed by the courts, and an assessment so made is not void, unless it be shown that in consequence of the location of the property it was impossible for it to receive any benefit therefrom: *Paulson v. City of Portland*, 16 Or. 460 (19 Pac. Rep. 450).

The converse of this rule must necessarily be true, that if there be property within the assessment district which has been benefitted by the local improvement, and wilfully, arbitrarily, and intentionally omitted therefrom, such assessment would be void; but accidental omissions from taxation of persons or property that should be taxed, occurring through the negligence or default of officers to whom the execution of the taxing laws is intrusted, would not have the effect of vitiating the whole tax. When the omission has occurred through no purpose to evade or disregard official duty, the occasion which produced it seems wholly immaterial: *Cooley, Taxation* (2d Ed.), 216. The apportionment of the tax is always presumptively just and equal, and cannot be frustrated on any grounds of policy, nor can it be set aside on any showing that in particular cases its operation is unjust; but the requirement of apportionment is absolutely indispensable in any exercise of the power to tax. There can be no such thing as a valid taxation when the burden is laid without rule, either in respect to the subject of it, or to the extent to which each must contribute. In this respect the legislature is as powerless as any subordinate authority, it being impossible there should be taxation that is at once arbitrary and valid: *Idem*, 243. Appellants contend that the plaintiffs do not allege that any of the assessments levied against the separate parcels of land are in excess of the direct benefits conferred, and therefore they have no cause of suit. Judge Elliott in his valuable work on *Roads and Streets*, in treating this question, says at page 186:

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"Benefits peculiar to the owner may, in a just sense, be said to constitute a compensation, because they add to the value of the property, and thus increase the owner's estate. It is, however, plainly inequitable to make one whose property is seized pay for a benefit which all the public secures, but for which no member of it except himself is required to pay. Although there are cases holding that such general benefits may be considered, they are not grounded in sound principles nor well sustained by authority."

In *City of Chicago v. Baer et al.* 41 Ill. 306, LAWRENCE, J., says: "Suppose, for example, a street improvement costing ten thousand dollars was of such character as to increase to that amount the value of A's property, and B and C each have property whose value is increased to the same amount, but nevertheless the entire cost of the improvement is assessed upon the property of A. Can his complaints be justly answered by telling him that he is not injured, because, although he pays ten thousand dollars, his property is increased in value to that amount? May he not truthfully reply that he has nevertheless been obliged to pay for benefits to the property of B and C, and to that extent his money has been taken for their use? We hold it to be clear, that while the power to make these special assessments may be sustained under the right of eminent domain, yet, in making them, the constitutional principle applies as fully as to the ordinary modes of taxation,—that one person's property cannot be improved at the expense of another, and that no special assessment can be sustained which imposes all the cost upon a portion of the property benefited, and leaves other property, equally benefited, wholly exempt. That the exact ratio of benefits can be determined with mathematical nicety is of course impossible, but that is the principle upon which the assessment must be made, as correctly as possible to fallible human judgments." Section 1 of article 9 of the constitu-

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tion provides that "The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation." This provision, however, does not apply to an assessment upon the lots and blocks abutting on a street for the improvement thereof, and an assessment upon such property in proportion to the benefit received is not unequal or un-uniform: *King v. Portland*, 2 Or. 146. The principle of equity and justice in all special assessments requires the property benefited by a local improvement to bear its share of the burden in proportion to the benefits received. The doctrine of such assessments rests upon the theory of benefits, and when the estate is required to respond in no greater sum than its share fairly apportioned the assessment is uniform and equal. The complaint, and a map that is made a part of it, presents a list of property which appears to have been benefited by the improvement, but omitted from the assessment. The presumption exists that the city council exercised in the assessment of this property an honest discretion, and apportioned the expense equally as compared with the benefits received, but this presumption is only a matter of evidence, and can be overcome by proof, and, in the absence of any answer denying the allegations of the complaint, must yield to such undenied allegation that the omission to assess it was arbitrary, and that the plaintiffs' property in consequence thereof was obliged to have an unequal share of the burden imposed. For this reason the decree of the court below is **AFFIRMED**.

Statement of the case.

[Argued June 9, 1893; Decided June 27, 1893.]

STATE v. LUCAS.

[S. C. 83 Pac. Rep. 588.]

1. LARCENY BY BAILEE—PAROL EVIDENCE.—In a case of larceny by bailee parol evidence is always admissible to show the real ownership of the property charged to have been stolen.
2. BAIL MONEY—ATTORNEY'S LIEN—CODE, § 1044.—Where money is specially deposited with an attorney to be used as cash bail for a client, and to be returned as soon as that purpose shall be accomplished, the attorney cannot acquire any lien thereon for his services; he is simply a special bailee and responsible as such.
3. JURY TRIAL—REMARKS BY COURT.—A remark by the court that "it does not follow because a woman is lewd that it affects her veracity," when it is attempted to affect the credibility of a witness by showing that she is lewd, is an invasion of the province of the jury, and prejudicial error: *State v. Olements*, 15 Or. 237, cited and approved.

Multnomah County: MICHAEL G. MUNLEY, Judge.

Defendant appeals. Reversed.

The defendant, John M. Lucas, who is an attorney of this court, was charged with the crime of larceny by bailee, on an indictment charging that on October 22, 1892, being the bailee of three hundred dollars, lawful money of the United States, the personal property of one Ninta Parker, he feloniously embezzled and converted the same to his own use. It appears that some time in 1892 an information was made before a magistrate charging Frank Lynch and Ninta Parker with the crime of adultery, and that defendant appeared for and represented Lynch, who alone was arrested. The preliminary examination resulted in his being held to await the action of the grand jury with bail in the sum of two thousand dollars, in default of which he was committed to jail. Through the efforts of the defendant, Lynch's bail was subsequently reduced to three hundred dollars, but being unable to secure a bail bond, the defendant called upon Miss Parker,

24	168
29	600
24	168
30	178
24	168
443	61
24	168
447	529

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and consulted her about furnishing the money to deposit in lieu thereof, telling her that the bail had been reduced to three hundred dollars. After some hesitation Miss Parker finally agreed to furnish the money for such bail, and borrowed three hundred dollars of one Winsor, which was delivered to the defendant either by Miss Parker or Winsor, both being present at the time, for the purpose indicated, he giving to Winsor the following instrument in writing in acknowledgment thereof:

"PORTLAND, OREGON, Aug. 23, 1892.

"Received of M. L. Winsor \$300 for bail, and for securing the discharge or release of Frank J. Lynch, charged with adultery; said bail money to be returned to said M. L. Winsor upon final disposition of such charge.

"JOHN M. LUCAS.

"GEO. H. THURSTON."

After receiving the money, the defendant represented to the committing magistrate and district attorney that it was impossible to raise more than one hundred and fifty dollars as bail for Lynch, and, with the consent of the district attorney, the bail was reduced to that amount, which was deposited by the defendant, and Lynch discharged, the defendant appropriating the remaining one hundred and fifty dollars to his own use. On the twenty-ninth of August the defendant procured and filed with the magistrate a bail bond, and received from him the money deposited in lieu thereof. Thereafter, but prior to the date of the conversion alleged in the indictment, Miss Parker repaid to Winsor the three hundred dollars, and received from him an order directing the defendant to deliver to her the money placed in his hands to be used as a deposit in lieu of bail for Lynch. Upon a trial before a jury the defendant was convicted and now appeals. Reversed.

Henry E. McGinn and Alfred F. Sears (Nathan D. Simon on the brief), for Appellant.

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George E. Chamberlain, attorney-general, *Wilson T. Hume*, district attorney, and *John H. Hall*, for the State.

MR. JUSTICE BEAN delivered the opinion of the court:

The indictment does not set out or allege the terms of the bailment under which defendant received possession of the money in question, nor was it necessary that it should: *State v. Chew Muck You*, 20 Or. 215 (25 Pac. Rep. 355). But the court, in charging the jury, after stating that among the material allegations of the indictment are (1) "that the money was put into the hands of the defendant as bailee, by Miss Parker, for a specific purpose"; (2) "and that it was to be returned to her when the object of such trust was accomplished," and (3) "that the defendant bailee had failed to return the money, or account for it according to the nature of his trust, and that he had wrongfully, and with felonious intent, converted the same to his own use," proceeded to say that if "the defendant Lucas received this money from Miss Parker, upon the specific trust alleged in the indictment, to be returned to her when the purpose of the trust had been accomplished, and that the defendant had not accounted to Miss Parker for the money in accordance with the nature of the trust, and feloniously converted the same to his own use, etc., you must find him guilty as charged." Now, the indictment does not allege that the defendant received the money from Miss Parker, or that he ever agreed to return it to her; and the evidence, about which there is no dispute, shows that by the written agreement he was to return the money to Winsor, and not to Miss Parker, and for a breach of this trust he is being prosecuted. The allegation that the property belonged to Miss Parker is a material averment in the indictment, and must be proven by the state before a conviction can be had, because it is descriptive of the offense charged; but if it did belong to her it is of no consequence for the purpose of this prose-

cution from whom the defendant received the money. The gravamen of the offense charged is that the defendant was in possession as bailee of certain money belonging to Miss Parker, which he has unlawfully and feloniously converted to his own use, and it is of no consequence from whom he received the money, or with whom the contract of bailment was made, if in fact it was the property of Miss Parker, and he has so converted it to his own use. "Within the meaning of the criminal law, a bailment," says Mr. Bishop, "is where one has personal property entrusted to him to be returned or delivered to another in specie when the object of the trust is accomplished": Bishop, Criminal Law, § 857. When, therefore, the money was entrusted to the defendant by either Miss Parker or Winsor, to be returned or delivered to Winsor when the object of the trust should be accomplished, his undertaking included the duty of a bailee, and the object of this trust would be accomplished by the return of the money to Winsor, or his assignee, after it had served the purpose for which it was intended. And yet, by the instruction, the jury were in effect told that unless the defendant had accounted to Miss Parker for this money after the purpose of the trust upon which he received it had been accomplished, he should be convicted, and this notwithstanding the fact that by the terms of the contract of bailment he was to return the money to Winsor.

1. It was contended by the defendant that the court erred in the admission of the testimony of Miss Parker and Winsor, tending to show that the money belonged to Miss Parker. This objection is based upon the contention that because the contract of bailment was in writing, and between Winsor and the defendant, it was not competent to show by parol that the money in fact belonged to Miss Parker. The rule is too well settled to require the citation of authorities that, as between the parties, parol evidence is not admissible to contradict or vary the terms of a writ-

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ten contract, but this rule has no application to the case in hand. This evidence does not in any way tend to contradict or vary the terms of the writing but only to show the ownership of the subject matter. The writing does not purport to be a contract between the owner of the money and the defendant; it simply acknowledges the receipt of it by the defendant from Winsor, to be used for a special purpose, and to be returned to him when that purpose shall have been accomplished. It contains no statement as to the ownership of the money, and, even if it did, would not preclude the state from alleging and proving the name of the real owner. Although the ownership of the property and the fact of bailment are material, they are in a certain sense incidental, the offence consisting in the unlawful and felonious conversion of the property or money by the defendant to his own use. The material subjects of inquiry on the trial were whether the money in fact belonged to Miss Parker, and, if so, whether the defendant feloniously converted it to his own use.

2. The next question is whether the defendant, if employed by Miss Parker as attorney for either Lynch or herself, had a lien upon the money in question after the purpose for which he received it had been accomplished, and the money had been returned to his possession. Upon this question the defendant requested the court to charge the jury that if the money belonged to Miss Parker, and she "engaged the defendant to appear for herself or for Frank Lynch, or for either or both of them, then the money in the hands of the defendant would be a fund upon which he would have a lien for the reasonable value of such services, and you must find the defendant not guilty." The court refused to so charge, but instructed the jury that "if this money was given to him (defendant) for a special purpose, and he was to apply it for bail, and there was no understanding that it should be applied for any other pur-

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pose, he could not have a lien upon it, and he could not apply it to the purpose of satisfying a claim for reasonable compensation." It is a general rule that an attorney has a retaining lien on papers, money, or other property in his possession belonging to his client, to secure his compensation for professional services rendered the client, whether the amount thereof is specially agreed upon or implied, and may retain such property until the balance due him shall be paid: Code, § 1044; 1 Jones, Liens, § 113; Weeks, Attorneys, § 371; *Hulburt v. Brigham*, 56 Vt. 368; *Van Etten v. State*, 24 Neb. 734 (1 Am. Law. Reg. 419; 40 N. W. 289).

But no such lien can attach where the papers or money are delivered to the attorney for a special purpose, as if the deeds are delivered in order that he may exhibit them to another, (*Balch v. Symes*, 1 Turn. & R. 87,) or to enable him to draw a mortgage, (*Lawson v. Dickerson*, 8 Mod. 306,) or when the money is delivered to him to apply in settlement of a suit (*Anderson v. Bosworth* (R. I.), 8 Atl. 339; 1 Jones, Liens, § 138). It has, however, been held that if the attorney is permitted to retain the property after the object for which it was given has failed, there is a general lien; (*Ex parte Pemberton*, 18 Ves. 282; *Ex parte Sterling*, 16 Ves. 258); but this is on the theory that permitting the papers or money to remain in the hands of an attorney after the object for which he received them has been accomplished or failed is equivalent to a general deposit, and can therefore have no application to a case where money or other property of a client is put into the hands of his attorney for a specific purpose, to be disposed of in a particular manner after such purpose shall have been accomplished. In such case no general lien can attach, because the terms of the bailment are inconsistent with the right to a lien. In such case the attorney becomes a bailee of the property for a special purpose, with the same rights, and subject to the same duties and liabilities, as any other bailee. If, therefore, in this case the money of Miss Par-

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ker was delivered to the defendant for the specific purpose of being used as cash bail to secure the discharge of Lynch, with an agreement on his part that when the money should have accomplished the purpose for which it was delivered to him it should be returned to Winsor, the terms of the bailment are inconsistent with, and antagonistic to, his right to hold a lien upon the money for his compensation as attorney for either Miss Parker or Lynch, and no such lien can attach in the absence of a special agreement to that effect.

3. The defendant's counsel, in the cross-examination of Miss Parker, who was a very material witness for the state, sought to affect her credibility by showing that she was lewd and immoral. During the argument of an objection to the admission of such evidence, the court, in the presence of the jury, said: "It does not follow that because a woman is lewd, that it affects her veracity." To say the least this was an unfortunate remark, and while it was no doubt an honest expression of the court's opinion, and only in answer to the argument of counsel, it was certainly invading the province of the jury, who are, under our system, the exclusive judges of the credibility of a witness, and was prejudicial error: *State v. Clements*, 15 Or. 244 (14 Pac. Rep. 410); *Hair v. Little*, 28 Ala. 236; *Fuhrman v. Mayor of Huntsville*, 54 Ala. 263; *Andreas v. Ketcham*, 77 Ill. 377. It is of the highest importance in the administration of justice that the court should never invade the province of the jury, or by word or act intimate its opinion upon a question of fact, or the credibility of a witness, for, as was said by the supreme court of California in *McMinn v. Whelan*, 27 Cal. 319, "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or other of the parties. By words or conduct he may, on the one hand,

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support the character or testimony of a witness, or, on the other hand, may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the other."

It follows that the judgment of the court below must be REVERSED and a new trial ordered.

[Argued May 29, 1893; decided June 27, 1893.]

IN RE CLINE'S WILL.

[S. C. *Bain v. Cline*, 33 Pac. Rep. 542.]

24	175
27	445
24	175
40	504

WILLS—INSANE DELUSIONS.—A delusion is a belief that has no reasonable basis in fact, and where there are any facts or circumstances that would or might lead the testator to entertain the particular belief that he does, such belief is not a delusion: *Potter v. Jones*, 20 Or. 240, cited and followed.

IDEM.—A determination by a testator to disinherit certain children because they were witnesses for their mother in a divorce suit against him, and had sympathized with her in the proceeding, is not an insane delusion rendering him unfit to make a will. However erroneous may have been his beliefs about the children, and their feelings toward him, there was still a basis of fact for them, and such beliefs are not delusions.

WILLS—TESTAMENTARY CAPACITY.—One who though he is seventy-five years of age, subject to severe bodily infirmities, absent minded and irritable, and his memory has failed him to quite an extent, is nevertheless a man of strong will and very difficult to move from an opinion once formed, and has not lost his reasoning powers, and has a good understanding of all business in which he is engaged, has the necessary capacity to make a will. *Chrisman v. Chrisman*, 18 Or. 127, cited and followed.

Multnomah County: LOYAL B. STEARNS, Judge.

Proceeding by Anne E. Bain and others, children of Jacob Cline, deceased, to set aside and annul the paper purporting to be the last will of said Jacob. The will was sustained and contestants appeal. Affirmed.

John H. Mitchell, and *Albert H. Tanner* (*Hiram E. Mitchell* on the brief), for Appellants.

Per Curiam.

Richard Williams, and Emmett B. Williams, for Respondents.

PER CURIAM.— This was a proceeding instituted in the county court of Multnomah County by the contestants to have the order admitting the will of Jacob Cline, deceased, vacated, and the will set aside and declared void. The testator executed this will at Portland, Oregon, in August, 1888, and died at San Bernardino, California, in December of the same year. By its terms his children Anne E. Bain, Mary P. Sax, Isabella Cook, and John Cline, and his grandchildren Lewis Cline, Laura Cline, Kate Cline, and Antha Cline, the children of Antha Cline, a deceased daughter, were left the nominal sum of one dollar each, and all the rest of his property was bequeathed and devised to his other two children Jacob Cline, Jr., and Jane Tunstall, who were appointed executor and executrix thereof without bonds. The county court sustained the validity of the will, and made an order re-probating it, from which the contestants appealed to the circuit court, where a decree was rendered affirming the order of the county court, from which the contestants appeal to this court.

The testimony discloses that from the time of his marriage until about 1862 the testator had been kind to his wife and affectionate to his children, but about that time he made a visit to the eastern states, and upon his return brought with him a woman whom he kept in his house against the protest of wife, who, in consequence of his misconduct, obtained a divorce from him. At the trial of that suit most of the children whom he disinherited were called as witnesses for their mother, and he then formed the determination to disinherit such of them as had appeared as witnesses for, or sympathized with, her. He never overlooked the part they had taken, or forgave them, and numerous witnesses testify to statements made by him to the effect that the contestants should never have

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any of his estate for that reason, but the devisees of his will, being very young at that time, could neither testify for, or otherwise aid, either party, and the testator's feelings towards them were consequently kind and affectionate. The grounds upon which the will is alleged to be void are that the testator, at the time it was executed, was, and for many years previous had been, a monomaniac, or the victim of an insane delusion, in reference to the children who were disinherited, and had without any adequate reason conceived the idea that they had deeply wronged him by taking sides with their mother, and falsely testifying against him in the divorce suit between himself and his wife; that they did not respect him, and were trying to rob him of his property, and that while laboring under these impressions he formed a prejudice towards them, and dwelt upon their supposed misconduct, until he had become the victim of an insane delusion, under the influence of which, and by means of the alleged inducement and fraudulent misrepresentations of the devisees, he made the will in question. It was held in *Potter v. Jones*, 20 Or. 240 (25 Pac. 769; 12 L. R. A. 160), that if there were any facts or circumstances which would reasonably lead the testator to entertain the belief he possessed, such belief was not a delusion. Applying this rule to the facts disclosed in the case at bar, it appears that most of the disinherited children were witnesses in the divorce suit against him, and he thought all sympathized with their mother, and these facts and circumstances led him to believe they were opposed to him, and were sufficient to support the conclusion he reached, and to establish the belief he possessed, hence such belief cannot be treated as a delusion.

The appellants contend that the testator, in consequence of old age and disease, was lacking in testamentary capacity. At the time the will was executed he was seventy-five years old, was weak and feeble, and had been quite ill with inflammatory rheumatism. He was afflicted with

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catarrh, which affected his head, back, and spine, and was so nervous that it was difficult for him to raise any liquid to his mouth without spilling it. He was absent minded and irritable, and his memory had failed him to quite an extent, particularly so after his rheumatic attack.

The testimony on this branch of the subject shows that notwithstanding his infirmities the testator was a man of strong will, and when he reached a conclusion upon a given question it was very difficult to change his opinion. Many witnesses who had known him for a long time, and whose veracity cannot be questioned, say that, although feeble, he possessed at the time the will was executed the same trait of character that he manifested in his younger days, that his mind had not lost any of its powers of reasoning, and that he had a good understanding of all business in which he was engaged. In *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. Rep. 6), it was held that neither old age, sickness, nor extreme distress or debility of body incapacitate, provided the testator has possession of his mental faculties, and understands the business in which he is engaged. We conclude from the foregoing that while the testator's memory may have been, and probably was, somewhat impaired with age and bodily infirmity, he had the necessary testamentary capacity, and executed his will according to his fixed determination made many years prior to its execution.

It is further contended that the execution of the will was the result of the undue influence, and the false and fraudulent representations of the devisees. A careful examination of all the testimony upon this subject leads us to the conclusion that the testator possessed a mind which none could influence or alter, that the opportunity was lacking for the exercise of such influence by the devisees, and that he executed his will in the way he had constantly indicated for a period of twenty-five years.

For these reasons the decree of the court below must be AFFIRMED.

Opinion of the court—BEAN, J.

[Argued June 12, 1893; decided June 27, 1893.]

MOODY v. MILLER.

[S. C. 83 Pac. Rep. 402.]

1. NOTICE OF APPEAL—ADVERSE PARTY—CODE, § 537.—Every party to a litigation who is interested in sustaining the judgment or decree appealed from is an "adverse party" within the meaning of section 537 of Hill's Code, and must be served with the notice of appeal. *Hamilton v. Blair*, 23 Or. 64, and *The Victorian*, 24 Or. 121, cited and approved. Within this rule a married woman who has executed a mortgage on two tracts of land, one of which is the property of her husband, is an "adverse party" to an appeal by the husband and his creditors from a judgment of foreclosure of such mortgage, finding that the debt was contracted for family supplies, and decreeing the sale of both tracts, and personal judgments for deficiency against both husband and wife.
2. IDEM—DEFAULT.—The fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such party with notice of appeal.

Wasco County: W. L. BRADSHAW, Judge.

Z. F. Moody brought suit against Charles S. Miller, Mary E. Miller and others to foreclose a mortgage. Decree for plaintiff, from which Charles S. Miller and his creditors appeal. Respondent moves to dismiss the appeal. Motion allowed.

William Lair Hill, for the motion.

Alfred S. Bennett, contra.

MR. JUSTICE BEAN delivered the opinion of the court:

This is a motion to dismiss an appeal from a decree in favor of the plaintiff, on the ground that the notice of appeal has not been served upon all the adverse parties. The plaintiff brought a suit to foreclose a mortgage in his favor, executed by the defendant Mary E. Miller upon two certain tracts of land in Wasco County, one of which turned out, in the course of subsequent litigation, to be the property of her husband, the defendant Charles S. Miller,

24	179
28	117
28	304
24	179
30	298
24	179
32	335
34	179
34	343
24	179
36	404
24	179
40	524

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from whom she had subsequently been divorced. The complaint avers that the mortgage was given to secure the payment of a debt contracted for the expenses of the family, and for money used in keeping in repair the property which was adjudged to the husband, and was therefore a debt of both Mary E. Miller and Charles S. Miller, and a joint lien upon their property; that both the parties are insolvent, and neither has any property except that covered by the mortgage; that the defendants Atwater & Bennett, and Smith are each subsequent encumbrancers of the property belonging to C. S. Miller, and their interests, if any, are subsequent and subject to the lien of plaintiff's mortgage; and that the defendant Grant has a judgment lien on the property of Mrs. Miller, which is also subsequent and subject to the lien of the plaintiff's mortgage. All the defendants were duly served with summons, and the defendants Mrs. Miller and Grant made default. The defendant C. S. Miller answered, tendering an issue mainly as to the debt for which the mortgage was given being one for family supplies, or repairs made upon his property, and claiming that neither he nor his property is liable therefor. The defendants Atwater & Bennett, and Smith, who are subsequent mortgagees of Miller, by their answer present substantially the same issue. The case was tried upon the evidence, and the court below found that the debt was contracted for family supplies, and decreed the foreclosure of the mortgage against the property of both Mr. and Mrs. Miller, and a personal judgment against both jointly for any amount that might remain unpaid after the sale of the mortgaged property, and that the interests of the other defendants be barred. From this decree the defendants C. S. Miller, Atwater & Bennett and Smith join in an appeal to this court, serving the notice of appeal upon the plaintiff, but not upon the defendants Mary E. Miller or Grant.

1. The motion to dismiss is based upon the proposi-

tion that the defendants Mrs. Miller and Grant are both "adverse parties" within the meaning of the statute (section 537, Hill's Code) requiring the notice of appeal to be served upon the adverse party. In *The Victorian*, 24 Or. 121 (32 Pac. Rep. 1040), it was said by LORD, C. J., that an "adverse party" within the meaning of the provisions of the statute, upon whom notice of appeal must be served, is "evidently every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal," and that "the party interested in sustaining the judgment or decree is an adverse party to the appellant, and, as such, is entitled to notice of the appeal." The statute has not abrogated the common law rule requiring all persons whose interests would be affected by the reversal or modification of the decree to be made parties to the appeal, and to be brought into court. It has only changed the mode of bringing them into court: *Senter v. DeBernal*, 38 Cal. 637; *Lillienthal v. Caravita*, 15 Or. 339 (15 Pac. Rep. 280); *Shirley v. Burch*, 16 Or. 1 (18 Pac. Rep. 344); *Hamilton v. Blair*, 23 Or. 64 (31 Pac. Rep. 197). Now, it is clearly apparent that Mrs. Miller is interested in sustaining the decree appealed from, for if this decree is reversed as to her husband, she will not only be personally bound for the whole judgment, but the entire amount will become a lien upon her mortgaged property, and if the liens of Bennett & Atwater, and Smith, or either of them, are advanced, and the plaintiff's lien postponed, on the property of her husband; she likewise may become bound for the whole amount of the debt, so that there can be no modification or reversal of the decree in the particulars claimed by the appellants without injuriously affecting her rights, and this brings the case within the rule laid down in *The Victorian*, ante, 121, and is fatal to the appeal.

2. But it was argued that because she made default in the court below, she ceased to be an adverse party, and

Points decided.

was not entitled to notice of the appeal. By her default she admitted nothing more than that the allegations of the complaint are true, and not that she is personally liable for the whole debt, or that it should be made a lien upon her property alone. No such issue was tendered to her, nor was she called upon to make any defense thereto, but when the appellants by this appeal seek to attack the decree of the court below they become the moving parties, and must, by their notice, bring into court all the parties to the record whose interests will be injuriously affected by the reversal or modification of the decree appealed from, and, not having done so, the motion must be allowed and the APPEAL DISMISSED.

[Argued June 13, 1893; decided June 27, 1893.]

JOHNSON v. BRIDAL VEIL LUMBERING CO.

[S. C. 83 Pac. Rep. 528.]

1. PUBLIC LANDS—HOMESTEAD—TIMBER LAND.—The fact that a tract of land is such as might be acquired under the Timber Act (20 U. S. Stat. 89), does not preclude anyone from acquiring title thereto under the homestead laws, if entry is made before anyone applies to purchase under the former Act.
2. PUBLIC LANDS—CONCLUSIVENESS OF DECISION OF LOCAL LAND OFFICERS.—The approval by local officers of final proof of a homestead entry which has been commuted, and the receipt and acknowledgment of the money therefor, is conclusive, in the absence of any allegation of fraud, that the land was of such character as could be acquired under the homestead laws of the United States.
3. PUBLIC LANDS—FORFEITURE OF LAND GRANT—TITLE BY RELATION.—One who at the time of the forfeiture of the Northern Pacific Land Grant by the Act of Congress of September 29, 1890, was an actual settler on such grant, and who, within six months after the passage of that act, made claim to his tract under the homestead law, will be considered as an actual settler from the date when he actually settled on the tract (*Faull v. Cooke*, 19 Or. 455, approved and followed); and a railroad company cannot, at any time subsequent to such actual settlement, locate its right of way over such settler's land under the Act of Congress of March 3, 1875, granting rights of way over the public lands of the United States: *Larsen v. Or. Ry. & Nav. Co.* 19 Or. 240, and *Faull v. Cooke*, 19 Or. 455, approved and followed.

94	182
25	105
33*	593
34*	1026
24	183
89	89

Statement of the case.

4. COMMUTING HOMESTEAD ENTRY—PRE-EMPTION.—The commuting of a homestead entry, under U. S. Rev. Stat. § 2301, by paying money in lieu of the time settlement, does not change the entry into a pre-emption.

Multnomah County: LOYAL B. STEARNS, Judge.

This is a suit by D. S. Johnson to enjoin the Bridal Veil Lumbering Company from constructing its railroad across plaintiff's land. The material facts are that on November 22, 1889, plaintiff was duly qualified to enter government lands under the homestead law of the United States, and on that day settled on the south half of the north half of section twenty-five, in township one, north of range five, east of the Willamette Meridian, which was embraced within the limits of the land granted to the Northern Pacific Railroad Company by the joint resolution of congress of May 31, 1870, for the purpose of enabling it to construct its main road to some point on Puget Sound, via the valley of the Columbia River. By an act of congress approved September 29, 1890, said grant was forfeited, and the lands restored to the public domain. The defendant is a corporation created for the purpose of constructing and operating a railroad from Bridal Veil, on the Columbia River, to the base of Mt. Hood in Oregon; and in pursuance of the act of congress of March 3, 1875, it surveyed a line for its railroad across the land in question, and filed proof of its organization and a map of said survey with the secretary of the interior, who approved the same September 18, 1889. The defendant, desiring to change, made another survey which crossed plaintiff's land on a different line from the first, and sent the map thereof to the commissioner of the general land office, who mailed it to the defendant to be filed in the local land office, but, said map having been lost, a duplicate thereof was filed, which on July 1, 1891, was approved by the secretary of the interior. The defendant commenced to build its railroad across the land in question on the line of this second survey, when the plaintiff, who had filed

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his homestead entry thereon, began this suit. The defendant's contention is that the said land is unfit for cultivation, and valuable chiefly for timber, and that it is not subject to entry under the homestead law. After the issues were completed, the plaintiff, on June 26, 1891, by leave of the court, filed a supplemental complaint, alleging that he had commuted his entry, and was then the owner of said land. The cause was referred to G. G. Gammans, Esq., to take and report the evidence, with his findings of fact and conclusions of law. The report of the referee, being against defendant's contention, the court approved the same, and decreed a perpetual injunction against it, from which it appeals. Affirmed.

Lewis L. McArthur (Earl C. Bronaugh, Wm. D. Fenton, and Earl C. Bronaugh, Jr., on the brief), for Appellant.

James Finley Watson (Edward B. Watson on the brief), for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

1. Defendant contends that because the surface of the land embraced in plaintiff's entry is broken and heavily covered with valuable timber, it is not subject to entry under the homestead laws of the United States, and that no title thereto can be acquired except under the act of congress of June 3, 1878 (20 U. S. Statutes, 89). That act provides "that surveyed public lands of the United States within the states of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of

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two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands; *provided*, that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by said states under any law of the United States donating lands for internal improvements, education, or other purposes." It will therefore be seen that this act exempted from sale any *bona fide* claim under any law of the United States. A homestead entry is a claim under the law of the United States, and, when made, is exempt from sale under the provisions of the timber act. It might be safely said that a homestead claimant who desired such a tract for a home and agricultural purposes had not exercised very good judgment in the selection, but if he could grow crops thereon, he would be entitled under the law to make his final proof and receive his patent. His right to make final proof and obtain a patent rests upon his cultivation of the soil, and not upon the exercise of his judgment in the selection of his homestead. Lands which are "valuable chiefly for timber, but unfit for cultivation," within the meaning of the act of congress of June 3, 1878, have been defined by the supreme court of the United States to mean such as are covered with heavy timber at the time of the purchase, notwithstanding the fact that by large expenditures of money and labor they may be rendered suitable for cultivation: *United States v. Budd*, 144 U. S. 154 (12 Sup. Ct. Rep. 575). The evidence conclusively shows that this tract of land is clearly such as might be acquired under the timber act, but this ought not to preclude any person from acquiring the title under the homestead law, if the entry was made before any person had applied to purchase under the former act.

2. Plaintiff, by leave of the court, filed his supplemental

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complaint in which he alleges that on June 16, 1891, he made final proof of settlement and cultivation, and commuted his homestead entry under the provisions of the eighth section of the act of congress approved March 2, 1862, paid the purchase price thereof, and received from the register and receiver their certificate No. 5183 of such commutation, and that he was then the owner of said tract by purchase and in the possession thereof. To this supplemental complaint the defendant answered denying each and every allegation thereof, but it does not allege that said certificate was fraudulently executed. The land department, in the first instance, is the sole judge of every fact which is to be considered in determining the rights of the respective applicants for government lands, and, in the absence of fraud, or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation, is conclusive: *United States v. Budd*, 144 U. S. 154 (12 Sup. Ct. Rep. 575). In *Shepley v. Cowan*, 91 U. S. 340, it was held that when the officers of the land office err in judgment upon a question of fact the courts can furnish no relief; but in cases of fraud upon their part the courts will review their action, as well as their construction of the law. In *Johnson v. Towsley*, 13 Wall. 86, it was also held that when the officers of the land office decide controverted questions of fact, in the absence of fraud, or impositions, or mistakes, their decision on these questions is final, except as they may be reviewed on appeal in that department. It follows then that when the plaintiff commuted his homestead entry, made his final proof, and the local officers approved the same, received his money for the land, and executed the receipt therefor, they passed upon the questions of fact therein raised, and in the absence of any allegation of fraud, their action is conclusive upon such questions, and that the land was of that character which plaintiff could

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acquire under the homestead laws of the United States.

3. The answer admits that the land embraced in plaintiff's entry was at the date of his settlement included in the grant to the Northern Pacific Railroad Company under the joint resolution of congress of May 31, 1870, and alleges that when this land was withdrawn for the benefit of that railroad company it thereby ceased to be public land of the United States, and the title was held in trust for that company, upon the performance of the conditions named in the grant. The act of March 3, 1875, granting rights of way over the public lands of the United States, could not apply to this land for the reason that it was not public lands of the United States, but was withdrawn for the Northern Pacific Railroad Company, hence the defendant could claim no rights therein by reason of the filing or approval of its map until the said grant was forfeited. When the grant to the Northern Pacific Railroad Company was forfeited, September 29, 1890, section 2 of the act provided that all persons who, at the date of the passage thereof, were actual settlers in good faith on any of the lands thereby forfeited, and were otherwise qualified, on making due claim on the said lands under the homestead law, within six months after the passage thereof, should be entitled to a preference right to enter the same under the provisions of the homestead law and said act, and should be regarded as actual settlers from the date of actual settlement or occupation. The plaintiff settled upon this land November 22, 1889, and made his homestead entry within the prescribed time; and when he made his final proof his title to the land related back to the date of his settlement, and the said second survey being subsequent to plaintiff's settlement and entry, the defendant could not rightfully enter upon said land and locate a new right of way under the act of 1875: *Larsen v. Or. Ry. & Nav. Co.* 19 Or. 240 (23 Pac. Rep. 974); *Faull v. Cook*, 19 Or. 455 (26 Pac. Rep. 662); *Sturr v. Beck*, 133 U. S. 541 (10 Sup. Ct. Rep. 350).

Points decided.

4. The defendant claims that when the plaintiff commuted his entry, and paid the money in lieu of the time required under the homestead law, he thereby changed his entry into a preëmption, and in consequence thereof its rights attached under its second map of withdrawal, and became paramount to plaintiff's. The commutation of a homestead entry under section 2301, revised statutes, is not an exercise of the preëmption right: 4 Dec. Dep. Int. 441; *Cotton v. Struthers*, 6 Dec. Dep. Int. 288; *Re Hewit*, 8 Dec. Dep. Int. 566. It was held in *Hastings R. R. Co. v. Whitney*, 132 U. S. 357 (10 Sup. Ct. Rep. 112), that the decisions of the land department on matters of law were not binding upon that court, but that on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. It would seem that the commutation of a homestead is not the exercise of the preëemptive right, and that the decisions of the land department upon this question, while not binding upon the courts, are consonant with reason and the rule in such cases.

It follows that the plaintiff's entry was prior to defendant's second survey, and that it had no right to construct its railroad across his land, and that the decree of the court below must be AFFIRMED.

[Decided June 27, 1893.]

COMMERCIAL NATIONAL BANK v. CITY OF PORTLAND.

[S. C. 33 Pac. Rep. 532.]

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT FOR PAYMENT FROM PARTICULAR FUND—DAMAGES FOR NEGLIGENCE IN NOT COLLECTING FUND.—A city which makes a contract for a street improvement, containing a stipulation that the contractor will look for pay only to a special fund to be collected and paid into the city treasury for that purpose, and that "he will not compel the city by legal process or otherwise

24	188
136	242
33*	532
37*	912

24	188
27	548

24	188
35	517

Statement of the case.

to pay for the improvement out of any other fund," is guilty of such neglect and unreasonable delay as to render it liable in an action for damages at the hands of the holders of warrants issued in payment for such improvements, where it has failed for five years to press to trial an injunction suit restraining the collection of the assessment necessary to make such payment.

Multnomah County: E. D. SHATTUCK, Judge.

This is an action brought by the Commercial National Bank of Portland against the City of Portland for damages because of the non-payment of certain warrants issued by the defendant city upon a special fund to be raised by the levy and collection of assessments upon the real property affected by the improvement of Twelfth Street, in the City of Portland, from the south line of B Street to the north line of Montgomery Street. The complaint sets out in full the ordinance of the defendant, providing for the time and manner of improving the street named, and also the contract under which the work was performed. It is shown that this contract was awarded to P. H. Schulderman & Co., on the eighteenth day of August, 1887. The contract contained a stipulation that upon the completion of the improvement according to its terms, and on the approval and acceptance of the same, the contracting firm would be entitled to certain specified sums of money for the various kinds of work done, and should be paid "by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose." The contract contained the further stipulation that "it is expressly agreed, and this contract is made upon condition, that the parties of the first part [meaning the contractors] shall look for payment for said labor and material only to the aforesaid fund to be assessed upon the property liable to pay the said improvement, and collected and paid into the city treasury for that purpose, and that the said parties of the first part will not require the City of Portland, by any legal process or otherwise, to pay for the same out of any

Statement of the case.

other fund." The contract was properly executed, and the work thereunder was completed within the time therein limited and was duly accepted by the city. In the months of October and November, 1887, city warrants were duly issued to the contractors, and some of them, aggregating twenty-two hundred and two dollars and thirty-four cents were duly assigned to plaintiff. These warrants were drawn on the said fund for the improvement of Twelfth Street. The complaint further alleges that all the warrants enumerated therein were, prior to the bringing of this action, endorsed in blank by said P. H. Schulderman & Co., and assigned and transferred for value to the plaintiff, and that the plaintiff is now the owner and holder of all said warrants; that demand was made upon the city treasurer for the payment thereof, which was refused, and that there is now due and payable from the defendant to the plaintiff the full sum mentioned in said warrants, with interest at the legal rate from the date of issue. A demurrer to the amended complaint was filed, and, after argument, was overruled. Thereupon the defendant filed an answer in the nature of a plea in abatement, averring that certain property holders on the line of said improvement had begun a suit to restrain the collection of said assessment for the improvement of Twelfth Street, upon various grounds. The city filed its answer to that suit, denying all the material allegations of the complaint, and pleading new matter by way of defense. On February 18, 1888, a temporary restraining order was issued as prayed for, which order is still in force, and it is now claimed by the city that by reason thereof it has been unable to collect the assessments necessary to meet the warrants of plaintiff. The plaintiff demurred to the plea in abatement, which was sustained, and judgment rendered in favor of the plaintiff for the full amount claimed, from which judgment an appeal is taken to this court. Affirmed.

William T. Muir, city attorney, for Appellant.

Argument of counsel.

An agreement explicitly stating that a contractor shall look for payment "only" to a special fund, and that he "will not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund," certainly should be held to mean something. We rely on the condition of the contract. The rights of the parties are fixed and determined by their own deliberate act. The court is construing an agreement and not dealing with any doctrine of implied liability. Where there exists a contractual relation, as in the case at bar, we are not aware of any legal principle justifying an abandonment of the contract deliberately made, and authorizing a general action for damages. The contractor, by his own act, circumscribed his right to recover. He cannot now forsake his express agreement and call upon the court to imply a broader, and, to him, better one. The position above outlined would seem to be sanctioned by the principles of law governing the construction and interpretation of contracts, and municipal powers and obligations, and is in accord with the decided cases: *Frush v. City of East Portland*, 6 Or. 281, 283; *Lake et al. v. Trustees*, 4 Denio, 520; *Pettis Co. v. Kingsbury*, 17 Mo. 479; *Board of Commissioners v. Mason*, 9 Ind. 97; 1 Dillon, *Municipal Corporations* (3d Ed.), § 413; *Campbell v. Polk Co.* 49 Mo. 214; *Boro v. Phillips Co.* 4 Dillon, 216, 223; *State ex rel. Zimmerman v. The Justices, etc.* 48 Mo. 475; 1 Daniel, *Negotiable Instruments*, § 433; *Baker v. Seattle*, 2 Wash. St. 576 (27 Pac. Rep. 462); *Trustees of Bellevue v. Hohn, etc.* 82 Ky. 1; *Travelers Insurance Co. v. Denver*, 11 Col. 434, 438, 440; *Fuller v. Heath*, 89 Ill. 296; *Peake v. New Orleans*, 38 Fed. Rep. 779, 782.

The plaintiff seems to place reliance on the two Oregon cases of *N. Pac. Lumber Co. v. East Portland*, 14 Or. 1, and *Portland Lumber Co. v. East Portland*, 18 Or. 21, but the essential feature of the designation of a particular fund out of which the cost of the improvement only was to be

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made, was absent in both of those cases, and its presence here makes a totally different case. The distinction between orders made payable out of a particular fund, and those which are issued as an evidence of general corporate liability, is well defined in the law.

In the absence of fraud or dishonest intent, no responsibility would result from any failure to collect the money necessary. Nothing is due under the contract or warrants until the assessments are collected. The only proceeding furnished by the law is one to compel the levying and collection of a tax to pay a liquidated claim. Mandamus is the proper remedy: 1 Hill's Code, §§ 592, 593; *Commonwealth ex rel. v. Pittsburgh*, 34 Pa. St. 496; *Commonwealth ex rel. v. Commissioners*, 37 Pa. St. 277; *Chapin v. Osburn et al.* 29 Ind. 99; *State ex rel. v. City of Keokuk*, 9 Iowa, 438; *Wilson v. Berkstresser et al.* 45 Mo. 283; *State ex rel. v. Justices*, 48 Mo. 475; *Whalen v. La Crosse*, 16 Wis. 288; *People v. Shearer*, 30 Cal. 645; High's Ex. Leg. Rem. § 139; *Hyatt v. Allen*, 54 Cal. 353; *Commissioners of Columbia Co. v. King*, 13 Fla. 451; *People v. Mead*, 36 N. Y. 224.

Geo. H. Durham (*Harrison G. Platt* on the brief), for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

The plaintiff claims that it was and is the duty of the defendant city to collect from the various owners of property abutting upon said Twelfth Street the several sums ascertained by the defendant to be the cost of making said improvement, and the charges specifically made against the various parcels of land affected by and liable for said improvement; that the defendant has wholly failed and neglected to perform this duty, and has not collected from the property holders the money with which to pay the warrants described, and is making no effort so to do;

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that by reason of the alleged neglect of duty by the defendant, plaintiff claims to be damaged in the amount of said warrants and the interest thereon. The principal question then is whether the city is liable for the payment of the warrants in question, in view of the stipulation requiring the contractor to look to a special fund for payment, and undertaking to exempt the city from general liability. The facts show that the contract under which the work was done was made on the eighteenth day of August, 1887, and that the improvement provided for therein was completed prior to the sixteenth day of November, 1887, in accordance with the terms of such contract, and was thereupon accepted by the city, and warrants, made payable out of the fund for such improvement, were issued to the contractors, among which were the warrants assigned to the plaintiff. As several years have intervened since the issuance of such warrants, and the city has failed and neglected to raise the special fund to pay them, the plaintiff has brought an action against the defendant for negligence, claiming that he is damaged in the amount of the warrants in question, and interest due thereon, and that the city is liable therefor. To defeat such action the defendant relies upon the stipulation in the contract, claiming that it limits the liability of the city to the special fund to be raised by assessments upon the property affected by the improvement, and confines the contractor's right of recovery to such fund. The stipulation provides that the contractor shall look for payment to the special fund, and that "He will not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund," and the defendant contends, if any force or effect is to be given to such stipulation, that it is liable to pay the warrants in question only when such special fund is raised and collected, and consequently that the defendant is not liable generally in an action for damages upon them. This view would relieve the city of any lia-

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bility to pay such warrants until such special fund is raised and collected by assessments, although its failure to realize such fund may be due to its own neglect or unreasonable delay.

Under its charter the city is invested with the power to order local improvements, and afforded the means to raise the necessary funds to pay for them by assessments upon the property benefited thereby. When the city orders a local improvement, the duty devolves upon it to put the necessary machinery in motion to raise the funds to pay for it by assessments upon the property affected. This duty devolved upon the city when it ordered the improvement of Twelfth Street, so that when the defendant entered into a contract for doing the work, and the contractor stipulated to look for payment to the special fund to be raised by assessments, the obligation rested upon the city to prosecute in good faith, and with reasonable diligence, the means afforded to it, under its charter, to raise and collect the fund necessary to redeem its obligation. There is no pretense but that the obligation resting upon the contractor to perform the work, and furnish the materials required, has been satisfactorily performed, and the improvement accepted. Having performed his obligation the duty rested upon the city to discharge its obligation. "When the contractor," says RUGER, C. J., "had performed his work according to his contract, he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over which he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligation. That was a power lodged in the hands of the city, and the clear intent of the contract

was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement; for an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty": *Reilly v. City of Albany*, 112 N. Y. 42 (19 N. E. 508). This doctrine, we think, is applicable to the case at bar. There is nothing in the stipulation of the contract absolving the city from the duty of making the assessment and enforcing its collection, hence the obligation rests upon it to make the necessary assessments, collect the same, and pay the contractor. The contractor can exert no control over its acts, nor has he any claim or lien against the property benefited by the improvement. There is no privity between the property owners on the line of the work and the contractor. The city alone can make the assessments and enforce their payment, so as to realize a fund out of which to pay the warrants in question; and it is the failure of the city to perform its duty in this regard upon which the general liability is predicated.

In *North Pacific Lumber Co. v. East Portland*, 14 Or. 6 (12 Pac. Rep. 4), THAYER, J., says: "The improvement is supposed to be a benefit to the lot owners referred to, and the lots affected are charged with the cost of making it. The city occupies the relation in the proceeding more of an agent than a principal. It does not undertake to pay the contract price for making the improvement out of the general funds of the city. I do not think it has any power to enter into such an agreement for the improvement of the city, but it does undertake to perform all the acts required by the charter intended to supply the requisite fund to defray the expenses attending it, and a failure to comply with any of the requirements of the charter by which the funds may be realized would subject it to a general liability." The distinction which is sought to be made between that case and the case at bar is not tenable. The stipulation of the contractor to look to a

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special fund did not absolve the city from the duty of putting the necessary machinery in motion to raise and collect such fund to redeem its obligation and to pay the warrants in question. When the contractor performed his contract, the duty rested upon the city to make an active effort to discharge its obligation. Has it done it? The record discloses that the work was completed and accepted by the city in 1887. The plea of abatement which was overruled by the court shows that in February, 1888, a temporary injunction was obtained against the city. For five years the injunction suit has been permitted to lie. For more than five years the city has had the use of the improvement, and there is nothing to indicate that it has made any effort to press the injunction suit to trial. The present action has been pending since May, 1891, which includes a period sufficiently long to have prosecuted the injunction suit to a final determination, and yet the record shows, and the argument concedes, that nothing has been done in the premises. In view of these facts, has there been such unreasonable delay as would charge the city with liability for neglect of duty? It has been repeatedly held, that it is presently liable, if the failure of the city to raise the fund and pay over the same to the contractor is due to its own neglect or unreasonable delay.

In *Cummings v. The Mayor*, 11 Paige, 596, it was held that it was the duty of the officers of the corporation to see that a proper assessment for the improvement was made, and that the money was collected thereon, and paid over to the contractor within a reasonable time after the completion of the improvement; and that, as the officers of the corporation had unreasonably neglected to compel a proper assessment to be made, the complainants were entitled to payment out of the general fund of the corporation. This case was approved and followed in *Baldwin v. City of Oswego*, 1 Abb. Dec. 62, in which the defendant

was held liable "on account of the neglect of its officers to enforce the legal instrumentalities provided for enforcing payment against the parties primarily chargeable with such payment." Nor is there anything in the cases of *McCullough v. Mayor*, 23 Wend. 458, and *Lake v. Trustees*, 4 Denio, 520, cited and relied upon by the appellant's counsel in conflict with this contention. In the former of these cases, BRONSON, J., said: "If the common council has neglected that duty (that is, of putting the necessary machinery in motion), or has been wanting in diligence, an action on the case would perhaps lie," etc. In the latter, which was an action on a warrant drawn by the trustees of the village upon the treasurer, the same judge remarked that the question whether the plaintiff had a remedy on the case against the trustees for neglect of duty did not arise on the bill of exceptions. In *Buck v. City of Lockport*, 6 Lansing, 251, JOHNSON, J., said: "The corporation cannot thus (that is, by neglecting to act) keep its creditors at bay, and then defend itself on the ground that its own officers and agents have not done what it is their duty to do." In *Richardson v. City of Brooklyn*, 34 Barb. 569, and *Hunt v. City of Utica*, 18 N. Y. 442, no negligence was shown, but the principle is recognized that for the negligence or unreasonable delay of the city to perform its duty, it is liable. In the first of these cases the court says: "This shows a case of due diligence on the part of the council in attempting to fulfil the duty enjoined upon them by the charter. If they had unreasonably neglected or refused to make the assessment, or to take the necessary steps for the collection of the tax, or refused to pay over the money when collected, an action on the case might be sustained against them."

The theory is that when the municipality passes an ordinance for a local improvement, it is its duty to prosecute with diligence the means afforded to it under its charter to realize the fund to pay for such improvement

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out of the property benefited. When, therefore, a city orders a local improvement, and enters into a contract for doing the work, containing a stipulation that the contractor will look for payment to the fund so realized, such stipulation does not absolve the city from the performance of its duty to put and keep in motion the machinery to obtain such fund, but the contract is based on the obligation of the city to perform its duty, in consideration of which the contractor stipulates to look for payment to the fund realized from its performance. So that if a city fails to perform its duty, or owing to its neglect or unreasonable delay fails to obtain such fund, it is guilty of a breach of duty and is liable. The plaintiff's action rests upon this theory. We think the record discloses a case against the city of want of diligence and neglect in the performance of its duty; and, therefore, there was no error, and the judgment must be **AFFIRMED**.

[Decided June 29, 1893; rehearing denied July 29, 1893.]

DRAKE v. SWORTS.

[8. C. 33 Pac. Rep. 563.]

1. **LIABILITY OF SURETIES ON ATTACHMENT BONDS—Costs—Code, § 146.**—The sureties on an undertaking in attachment which complies with the provisions of section 146, Hill's Code, that the sureties shall give an undertaking "to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful and without sufficient cause," are liable to the defendant, in case of judgment in his favor, for all the costs in the action, and not simply for such expenses as may have been incurred on account of the attachment. *Bing Gee v. Ah Jim*, 7 Saw. 115 (7 Fed. Rep. 811), approved and followed.
2. **PLEADING—DEFECT CURED BY ANSWER.**—A complaint in an action on an attachment bond which provided for the payment of all damages sustained by the attachment if the same should prove wrongful and without sufficient cause, (should state that the attachment was wrongful or without sufficient cause, but such an omission is cured by answering over. *Olds v. Cary*, 13 Or. 362, approved and followed.

24	198
29	308
24	198
32	232
24	198
136	276
24	198
88	198
24	198
89	876
24	198
41	82

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3. **DISCHARGING ATTACHMENT BY RE-DELIVERY BOND**—CODE, § 154.—The execution and delivery by a defendant in an attachment action of a re-delivery bond, conditioned for the return of the property or its value, in case plaintiff shall obtain judgment, as provided for by section 154, Hill's Code, does not dissolve the lien of the attachment (*Kohn v. Hinshaw*, 17 Or. 308, cited and approved), nor is it a waiver of the right of action on the attachment bond. The giving of the bail bond under sections 159 and 160, Hill's Code, will dissolve an attachment (*Duncan v. Thomas*, 1 Or. 314, cited and approved), but such is not the effect of a bond under section 154.*
4. **COSTS**—**LIABILITY OF SURETY ON ATTACHMENT BOND**—**EVIDENCE**.—The surety on an attachment bond conditioned for the payment of all costs that may be adjudged to the defendant cannot, when sued on the bond, show that some of the items included in the judgment for costs were erroneously included therein, since the undertaking binds him to abide the result of the attachment action without being a party thereto.

Harney County: MORTON D. CLIFFORD, Judge.

This is an action brought by H. M. Drake against Sworts & Miller, and against J. C. Wooley and P. F. Steuger, their sureties on an attachment bond given in an action at law brought by Sworts & Miller against the plaintiff herein. The complaint, in substance, alleges that in pursuance of said undertaking, and the affidavit of Sworts & Miller, a writ of attachment was issued in said action upon which thirty-one head of horses, the property of plaintiff, were attached and detained by the sheriff for forty-seven days, and until the plaintiff gave a re-delivery bond, as provided by law; that on a trial of said action before the court and jury the defendant (plaintiff herein) obtained a judgment for the sum of four hundred and nineteen dollars and ten cents as costs and disbursements, which remains unpaid, and for which he demands judgment in this action, upon the undertaking. A demurrer to the complaint was overruled, and judgment for want of an answer was rendered against all the defendants except

*NOTE.—In connection with this discussion see the case of *Bunneman v. Wagner*, 16 Or. 433 (8 Am. St. Rep. 306; 18 Pac. Rep. 841), but it does not appear under what section of the statute the bond in that case was given.—
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Wooley, who answered admitting all the allegations of the complaint except as to the amount of the judgment for costs, and as to that, it is denied to be for more than one hundred and ten dollars. A trial before the court, without the intervention of a jury, resulted in a judgment in favor of the plaintiff for the amount claimed, from which the defendant Wooley appeals. Affirmed.

T. Calvin Hyde, and Cyrus A. Sweet, for Appellant.

Chas. W. Parrish, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

1. The defendant contends that the obligors in an undertaking for an attachment, under our statute, are not liable for all costs that may be adjudged to the defendant in the action, but only for such expenses as may have been incurred on account of the attachment. On the other hand, the contention for plaintiff is that he is entitled to recover in an action on the undertaking all costs and disbursements adjudged to him in the original action, whether on account of the action itself or the attachment therein. The liability of the obligors is measured by the conditions of the undertaking, and, as the undertaking in this case by its terms complies with the provisions of section 146 of Hill's Code, the decision of the controversy depends upon the construction of that section, which provides that the plaintiff in an action, before procuring an attachment to issue, shall give an undertaking, with one or more sureties, "to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment if the same be wrongful and without sufficient cause, not exceeding the sum specified in the undertaking." Under this statute there are plainly two obligations assumed by the parties to an undertaking for attachment: (1) that the plaintiff will pay all costs, which, of course,

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includes disbursements, that may, by the court in which the action is tried, be adjudged to the defendant; and (2) if the attachment is wrongful and without sufficient cause, to pay such damage as the defendant may sustain by reason of the attachment. These are separate and distinct obligations, independent of each other, the latter of which may happen without the former, and even if the plaintiff should prevail in the action. This, it seems to us, is the plain and obvious meaning of the statute, and so clearly expressed that it cannot be construed so as to limit the obligation to the costs incurred in the attachment. We are aware, of course, that this construction makes the undertaking for an attachment a security for costs in case the defendant prevails in the action, but it was wholly within the power of the legislature to impose such conditions if the plaintiff is to seize the defendant's property upon an attachment even before a cause of action has been established, and the court is bound to give the statute effect, according to its language and evident intent. This is the construction placed upon the statute by Mr. Justice DEADY in *Bing Gee v. Ah Jim*, 7 Fed. Rep. 811 (7 Saw. 115), in an able and well considered opinion, and is the construction given to similar statutes in other states: *Greaves v. Newport*, 41 Minn. 240 (42 N. W. Rep. 1059); *Lee v. Homer*, 37 Hun, 634; S. C. affirmed, 109 N. Y. 63 (15 N. E. Rep. 896).

2. It was claimed by the defendant that the complaint in this case is defective because it does not allege that the attachment was wrongful or without sufficient cause. This defect, if any, was cured by answering over: *Olds v. Cary*, 13 Or. 362 (10 Pac. Rep. 786).

3. It is also contended that the execution and delivery by plaintiff of the re-delivery bond, as provided in section 154, Hill's Code, operated as a discharge of the attachment and a waiver of the right of action on the undertaking therefor. A distinction is to be observed between the

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effect of a bail bond, as provided for in sections 159 and 160, and the re-delivery bond given in this case. The former, being given as security for the payment of such judgment as may be recovered in the action, operates to discharge the attachment, (*Duncan v. Thomas*, 1 Or. 314,) and is probably a waiver of the right of action on the undertaking; (*Rachelman v. Skinner*, 46 Minn. 196; 48 N. W. Rep. 776); but the undertaking provided for by section 154 of the Code, is not for the payment of the judgment recovered in the action, but is an engagement to redeliver the attached property, or pay the value thereof, to the sheriff to whom execution upon a judgment obtained by the plaintiff in the action may be issued, and authorizes the sheriff to yield the actual possession of the attached property to the defendant or other person claiming it, but does not dissolve the attachment nor withdraw the property from the operation of the lien thereon: *Kohn v. Hinshaw*, 17 Or. 308 (20 Pac. Rep. 629). "It differs from a bail bond," says Mr. Drake, "in that it does not discharge the lien of the attachment, since the very object of the bond is to insure the safe keeping and faithful return of the property to the officer, if its return should be required": Drake, Attachments, § 331, and authorities cited. And this is the rule, though the bond be conditioned in the alternative, for the delivery of the property or for the payment of its value: Wade, Attachments, 193; *Gass v. Williams*, 46 Ind. 253; *Gray v. Perkins*, 12 S. & M. 622. Such being the effect of the re-delivery bond it did not operate as a waiver of the right of action on the undertaking for the attachment.

4. On the trial the defendant sought to show that certain items going to make up the amount of the judgment for costs and disbursements in the action were erroneously included therein, and the rejection of this evidence is assigned as error. It is argued that such evidence was admissible in behalf of the defendant Wooley, who was

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not a party to the action, and hence it is claimed not bound by the judgment. The vice in this argument lies in the fact that his contract binds him to abide the result of that action without being a party to it. His obligation is that "the plaintiff will pay all costs that may be adjudged to the defendant." The action was to be litigated by the plaintiffs, and Wooley undertook that he would abide the judgment of the court so far as costs and disbursements are concerned. It was so litigated, and a judgment rendered in favor of the defendant (plaintiff herein) for four hundred and nineteen dollars and ten cents, as costs and disbursements. From this judgment no appeal has been taken. It stands in full force and effect, and the amount thereof is binding upon the plaintiffs in the action, and is conclusive upon the appellant herein. This judgment not having been paid, the obligation of the defendant was broken, and he is liable on his undertaking for the amount thereof: *Lothrop v. Southworth*, 5 Mich. 448; *Weaver v. Poyer*, 73 Ill. 489; *McAllister v. Clark*, 86 Ill. 236.

It follows that the judgment of the court below must be AFFIRMED.

[Decided June 29, 1893; rehearing denied July 24, 1893.]

BAMBERGER v. GEISER.

[S. C. 83 Pac. Rep. 609.]

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38	250
24	203
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MORTGAGE AS SECURITY—ASSIGNMENT OF DEBT.—It is a familiar principle that where a debt is secured by a mortgage, the former is the principal and the latter an incident thereto, and that an assignment of the debt is an assignment of the mortgage, particularly where the debt is evidenced by a negotiable promissory note. Where such a note, secured by a mortgage, has been assigned by endorsement, the security is protected in the hands of a *bona fide* holder to the same extent as the note itself, unless there be a law requiring assignments of mortgages to be recorded.

DISCHARGE OF MORTGAGE BY MORTGAGEE OR TRANSFEREE.—A mortgagee or his transferee after assigning a negotiable note secured by a mortgage, has no power to enter of record a satisfaction of such mortgage; such an entry is wholly void and affords neither protection nor priority to a subsequent purchaser or mortgagee, even though the latter acted in perfect

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good faith without notice of the assignment, and relying upon the recorded release, where there is no law requiring assignments of mortgages to be recorded.

RECORDING ASSIGNMENT OF MORTGAGE—CODE, §§ 3030 and 3031.*—In Oregon there is no obligation resting upon an assignee of a mortgage to record his transfer in order to protect himself against subsequent purchasers or mortgagees; sections 3030 and 3031, Hill's Code, impliedly permit such an instrument to be recorded when it is in the form of a conveyance, but it is optional with the transferee. Where the assignment of the mortgage is by an endorsement, or some memorandum not having the form of a conveyance, it cannot be recorded at all, under existing laws: *Oregon Trust Co. v. Shaw*, 5 Saw. 340, and *Watson v. Dundee Mtg. Co.* 12 Or. 481, approved and followed.

Baker County: MORTON D. CLIFFORD, Judge.

This is a suit by H. Bamberger, M. L. Tichner, and Sol Tichner, partners, as Bamberber, Tichner & Co., against Daniel Entermille, Emma Geiser, Edward Geiser, and Frank Geiser, and also Albert Geiser and Louise Geiser, both individually and as administrators of the estate of John Geiser, deceased, to foreclose a mortgage. Decree for plaintiffs, and defendants appeal. Affirmed.

L. M. Robinson and F. C. White for Appellants.

Olmstead & Courtney for Respondents.

The facts in this case are that on the fifteenth day of July, 1889, the defendant Entermille made and delivered

* The only sections of the Oregon Code bearing on the questions discussed in this opinion are as follows: § 3030. The recording of the assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made by them or either [of them], to the mortgagee. § 3031. Any mortgage that has been recorded may be discharged by an entry on the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the county clerk, who shall subscribe the same as a witness. § 3032. Any mortgage shall also be discharged upon the record thereof by the county clerk in whose custody it shall be, whenever there shall be presented to him a certificate executed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed to entitle conveyances to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged.—REPORTER.

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his negotiable promissory note to A. J. Lawrence, C. W. Mandeville, and R. S. Anderson, for the sum of five hundred dollars, payable sixty days after date, and to secure the payment of the same he made and delivered to them his mortgage upon certain real estate, which mortgage was duly acknowledged and recorded. Thereafter the said promissory note was endorsed on the back "Without recourse," and signed by each of the payees named therein, when it was delivered into the possession of A. J. Lawrence, one of such payees, with the consent of the other two payees, to hypothecate or sell it. On the twenty-second day of July, 1889, the said A. J. Lawrence sold and delivered said note to the plaintiffs, and, at the same time, delivered to them the mortgage securing its payment, which said note and mortgage the plaintiffs still own and hold, and no part of the same has ever been paid. Subsequently, but before the maturity of the note, the defendant Entermille paid to Anderson and Mandeville, two of the payees named therein, the sum of fifty dollars for the purpose of liquidating in full the note and discharging the mortgage, whereupon Mandeville, one of the payees, wrote upon the margin of the mortgage record as follows: "State of Oregon, County of Baker. Full and complete satisfaction of the within mortgage this twelfth day of August, 1889, acknowledged. Lawrence, Anderson, and Mandeville. Per C. W. Mandeville. Attest: W. H. Packwood, Deputy County Clerk,"—all which was without the knowledge or consent of the plaintiffs. Their first knowledge of such discharge was acquired when this suit for foreclosure was commenced.

John Geiser, now deceased, took a mortgage on the same premises from the defendant Entermille to secure the payment of a sum specified therein, but at the time of taking the same he knew of the payment of the fifty dollars by the defendant Entermille to said Anderson and Mandeville, and that the note secured by the mortgage

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was not taken up nor delivered when the record was so endorsed. On the twentieth day of January, 1891, after the death of John Geiser, the defendants named as administrators of his estate, in payment of such mortgage, took a deed from the defendant Entermille, wherein and whereby he conveyed to the estate of John Geiser deceased all his right, title, and interest in and to the property described in said mortgage, and, at the time of taking such deed, the defendant Entermille represented to the defendant administrators aforesaid that the note was paid and the mortgage cancelled, and said administrators examined the records of Baker County and found the mortgage cancelled in the words as already set out. Neither the defendant Entermille nor the defendants Geiser, administrators as aforesaid, knew that the plaintiffs owned the note until the commencement of this suit.

The trial resulted in a decree in favor of the plaintiffs, foreclosing their mortgage, and ordering the property sold to satisfy the note, etc., from which decree the defendants have brought this appeal. Affirmed.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

The question to be determined is whether the discharge of a mortgage upon the record by a mortgagee, after he has assigned it, operates to cancel such mortgage as against subsequent purchasers, in good faith and for value. If this question is to receive an answer in the affirmative, it must be owing to some legal obligation which our registry laws impose upon an assignee to record his mortgage if he would protect himself against such subsequent purchasers and encumbrancers. It is well settled that a mortgagee and his assignee are regarded as purchasers under the registry laws. It is a familiar principle that where a debt is secured by mortgage, the debt is the principal and the mortgage is the incident, and that an assignment of the

debt is an assignment of the mortgage. Here there was a written assignment of a negotiable note before maturity, and a delivery of the mortgage.

The assignment of the note carried the mortgage, as the former is the principal and the latter the incident. The assignee stands in the place of the payee. As the assignment of the note carried the mortgage, upon recognized legal principles the security is protected in the hands of a *bona fide* holder to the same extent as the note itself, unless there is some requirement of the law for the registry of such assignments. In *Carpenter v. Longan*, 16 Wall. 273, it was held that the assignment of a negotiable note before its maturity raises the presumption of a want of notice of any defense to it, and that this presumption stands until overcome by proof, Mr. Justice SWAYNE saying: "The case is a different one from what it would be if the mortgage stood alone, or the note was non-negotiable, or had been assigned after maturity. The question presented for our determination is whether an assignee, under the circumstances of this case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract, as regards the note, was that the maker should pay it at maturity to any *bona fide* indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently, in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. If one of two innocent persons must suffer by a deceit, it is more consonant to reason that he who 'puts trust and confidence in the deceiver should be a loser rather than a stranger.'"

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We must turn, then, to our registry laws and ascertain whether they impose any legal obligation upon the assignee of a note secured by a mortgage to take the assignment in the form of a conveyance, and have it recorded, as a means of affording notice to subsequent purchasers and encumbrancers, if he would avoid the postponement of his lien as to them. Section 3031, Hill's Code, provides that a mortgage may be discharged upon the record thereof "by the mortgagee or his personal representative or assignee" acknowledging satisfaction of the mortgage before the clerk, or executing a certificate to that effect with the formalities of a deed, and presenting the same to the clerk. This section recognizes the assignee as the proper party to discharge the record after the assignment of the note and mortgage. He is the *bona fide* owner and holder of the note and its security, which entitles him to discharge the mortgage. The mortgagee, after he has assigned his interest, has no power to extinguish the mortgage by acknowledgment of its satisfaction, release, or otherwise. Being without the power, his fraudulent acknowledgment of satisfaction cannot affect the rights of the assignee. As Mr. Justice DEADY said, "Such an acknowledgment is simply a fraud, and if any person must suffer by it, it ought to be the person who, by ignorance or carelessness, or otherwise, was deceived by it and acted upon it, but not the assignee who acquired the mortgage without fault and is a stranger to the fraudulent transaction. As well say that the purchaser in good faith from the grantee in a forged deed that has been admitted to record, is thereby protected at the expense of the true owner, who is without error or fault in the premises": *Oregon Trust Co. v. Shaw*, 5 Saw. 340.

In *Joerdon v. Schrimpf*, 77 Mo. 386, under a similar statute providing for the discharge of the record by the mortgagee and assignee, the court says: "The statute recognizes the assignee of the mortgage as the proper party to enter the satisfaction, and it has been held that

he is the proper party to make the entry." In that case one Ohlendorf was the payee of the note secured by the deed of trust, and the court said: "If the plaintiff purchased the note for value, before maturity, and before the entry of satisfaction, the payment to Ohlendorf and his entry of satisfaction of the record could not affect the security afforded by the deed of trust." * * * "Ohlendorf was not the *cestui que trust* when the entry was made, and was not the person authorized by the statute to make it, and it stands on the record a nullity."

In *Lee v. Clark*, 89 Mo. 556, it was held that the payee of a note secured by a deed of trust, after he had assigned the note, cannot discharge the property of the lien, as between a *bona fide* purchaser of the property and the assignee of the note, by entering satisfaction of the debt on the margin of the record, or otherwise. As notes secured by mortgage are transferable by the law merchant, and as, after such transfer, the mortgagee has no right or power to acknowledge satisfaction or to release the mortgage, it follows, as the cases indicate, that a person, desiring to purchase property, who finds on the record a mortgage which purports to be satisfied or released, must ascertain whether it was satisfied or released by the person authorized to discharge it. "Purchasers," says Mr. Jones, "are bound to know that if the mortgagee has endorsed the notes before maturity to a *bona fide* holder, the mortgagee has no longer authority to satisfy the mortgage; and therefore they are bound to ascertain whether the mortgagee still held the notes at the time he discharged the mortgage": 1 Jones, Mortgages, § 814. To the question, often reiterated, what shall a person desiring to purchase do under such circumstances as are disclosed by this record, we may quote the answer of HENRY, J., in *Lee v. Clark*, 89 Mo. 556, "Let it alone until he can ascertain who holds the note. He is under no obligation to buy, and prudence would dictate that he should not buy until satisfied that the owner of the

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note had entered satisfaction of the debt." It may be true, as suggested by Mr. Justice DEADY, that the statute (section 3031) is defective in not requiring the party making the acknowledgment or certificate to produce the evidence that he is at the time such mortgagee or assignee as to entitle him to discharge the record. But, however that may be, it is clear that a mortgagee cannot extinguish a mortgage which has passed from him by assignment; and, consequently, that a discharge of the record by the mortgagee, after its transfer, is a fraud upon the assignee, and his rights are unaffected thereby. Such being the case, unless the registry law makes it the duty of the assignee to take the assignment in the form of a conveyance and have it recorded, he is not bound to do so.

We are to inquire, then, whether there is any statute which imposes a legal obligation upon an assignee to record his assignment if he would protect himself against a subsequent purchaser or encumbrancer in good faith and for value? In many states provisions are made for recording the assignment of a mortgage, or, in default thereof, of postponing it to the conveyance of a subsequent purchaser or mortgagee. As the purpose of the registry laws is to protect subsequent purchasers against prior and unrecorded conveyances, the utility and convenience of extending such laws to the assignment of mortgages is conceded; but the registration of conveyances, or other instruments, is purely the creation of the statute, and unless it requires the assignee to record the assignment of the mortgage, he is not guilty of negligence in failing to do so. There is no specific direction in the statute upon the subject. The only mention of an assignment, as such, is found in section 3030, Hill's Code, which provides that "the recording of the assignment of a mortgage shall not in itself be notice to the mortgagor so as to invalidate a payment made by him to the mortgagee." But this was only a declaration of the rule established by

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the courts long before there was a statute authorizing assignments to be recorded. In *James v. Morey*, 2 Cow. 246, SAVAGE, C. J., said: "I know of no law requiring the assignment of a mortgage to be recorded. If notice of the assignment is not given to the mortgagor, he is protected in any payment he may make to the mortgagee. And this is the extent of the risk run by the assignee who neglects to give notice of the assignment." This provision then, as Mr. Justice DEADY said, was "merely the assertion of a rule that had long been established by the courts"; and, he added, "The most that can be said for this provision is that it impliedly authorizes an assignment to be recorded, or rather contemplates that it may be recorded by virtue of some other provision or statute. And yet by a still stronger implication arising out of sections 22 and 34 of said chapter, and the very nature of the case, it is provided that no instrument affecting the realty, which includes an assignment, shall be admitted to record, unless acknowledged and certified as a conveyance. An assignment of a mortgage may be made by an instrument in the form of a conveyance, and, in such case, may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass the lien of the mortgage, but it would not be entitled to record unless acknowledged and certified. But in the case of a mortgage given as security for a negotiable note, the debt being the principal and the security the incident, the same may be assigned by the simple indorsement or delivery of the note. In such case there is no assignment to record. In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee": *Oregon Trust Co. v. Shaw*, 5 Saw. 340.

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This decision was approved by the writer in *Watson v. Dundee, Mtg. Co.* 12 Or. 481, (8 Pac. Rep. 548,) but, owing to the absence of one member of the court, and the dissent of the other, it failed to receive the approval of the court, so that *Watson v. Dundee* cannot be regarded as authority upon this subject. A more thorough consideration of the subject, rendered necessary by the facts in the case at bar, has satisfied us that the recording acts do not extend to the assignment of mortgages, and that the construction given to them in *Oregon Trust Co. v. Shaw* is correct. There is nothing in section 3030, *supra*, expressly or otherwise requiring an assignee to record his assignment. It nowhere imposes any duty upon him to have the assignment of the mortgage acknowledged and recorded to protect himself either against the fraud of his assignor, or the rights of subsequent purchasers or encumbrancers. The most that can be said for this section is that it contains an implication that when the instrument of assignment is in the form of a conveyance it may be admitted to record, but there is no language in it, or any other provision of the recording acts, which requires the assignee to record it in order to protect himself against the subsequently acquired rights of purchasers or encumbrancers in good faith or for value. Where there is no legal obligation resting upon the assignee to record the assignment to protect himself against subsequently acquired rights in the property, a mortgage may be assigned without any formal conveyance, as in the present case, by a simple indorsement on the note and delivery of the mortgage. The fact, therefore, that the assignee might take the assignment in the form of a conveyance and record it, cannot make his failure to do so negligence which operates to postpone his lien as against subsequent purchasers or mortgagees.

The question is not what the plaintiffs might have done to apprise the defendant grantees that they were encumbrancers, but what they were legally bound to do

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in order to preserve the priority of their lien against the subsequently acquired rights of the defendants in the property. As the plaintiffs were not bound, under the recording acts, to register their assignment, they were under no legal obligation to take the assignment of the mortgage in the form of a conveyance, and record it, in order to prevent a fraudulent discharge of the record, or to protect subsequent grantees or mortgagees. They had the right to assume that the defendant grantees knew the law, and that they would exercise that degree of care and prudence which the law imposed upon them to avoid loss. When the defendants found that the mortgage was satisfied upon the record they were bound to ascertain whether it was done by one having authority, or take the consequences of their neglect. As ELLIOTT, C. J., said, "A second mortgagee who finds on record a mortgage receives notice of its existence, and he must ascertain whether the release was executed by one having authority, for he is bound to know, as matter of law, that notes secured by mortgage are transferable as articles of commerce, and that, after transfer, the mortgagee has no right to release the mortgage. He is bound, also, to know that he can obtain no notice from the record, because the law does not authorize the recording of assignments, and that he must, therefore, look elsewhere for information": *Reeves v. Hayes*, 95 Ind. 527. Section 7, 2 Rev. Stat. 1876, p. 335, of the Indiana statute, is identical with section 3030 of the Oregon statute, and although there are terms in the registry laws of that state much more comprehensive than our own, yet it was held in *Reeves v. Hayes* (1) that a mortgagee, after assigning the debts secured by a mortgage, has no power to enter satisfaction of a mortgage, and that such entry of satisfaction by him on the margin of the record will not give priority to a subsequent mortgagee in good faith without actual notice of the assignment of the debt; and (2) that there is no law authorizing the recording of an

Opinion of the court—LORD, C. J.

assignment of a mortgage, and that such record, if made, would not have been notice to subsequent purchasers or mortgagees in good faith. In the absence, therefore, of any legislative direction requiring the assignment of mortgages to be recorded, there is no obligation resting upon an assignee to record an assignment to protect himself against any subsequent purchaser or mortgagee.

It results from these considerations that there was no error, and that the decree must be **AFFIRMED**.

[Decided June 29, 1893.]

SOMMER v. ISLAND MERCANTILE CO.

[S. C. 33 Pac. Rep. 559.]

CHATTEL MORTGAGES—PAROL EVIDENCE.—A description in a chattel mortgage is sufficient, if by the aid of parol proof the particular property may be identified, and such proof is admissible for the purpose of applying the description, though not for enlarging it.

CHATTEL MORTGAGE—DESCRIPTION.—A description of the mortgaged property, in a chattel mortgage, as being a given number of feet of good merchantable lumber, in the yard of a designated company, on a creek named, in a given county, "being piled and ricked thereon in the usual manner, and consisting of general common lumber,"—is sufficient.

Union County: **MORTON D. CLIFFORD**, Judge.

Action by D. Sommer against the Island City Mercantile and Milling Company, a private corporation, for converting certain lumber on which plaintiff held a mortgage. Judgment went for plaintiff, and defendant appeals. **Affirmed**.

Chas. H. Finn, for Appellant.

J. H. Slater & Sons, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is an appeal from a judgment rendered against the defendant in an action of trover for the conversion of

24	214
134	92
24	214
43	575
43	586

a certain lot of lumber upon which the plaintiff held a chattel mortgage. The record discloses that a motion to make the complaint more definite and certain was sustained, and that the plaintiff was allowed to amend the complaint so as to show that the mortgage was intended to cover all the lumber upon the mill yard at the time it was given. The description of the property in the mortgage is as follows: "One hundred thousand feet of good, merchantable lumber then and there being upon the lumber yard of the Elgin Lumber Company, upon what is known as Gordon Creek, in Union County, Oregon, the said lumber being piled and ricked thereon in the usual manner, the said lumber then and there consisting of general common lumber," etc. A demurrer was interposed to the sufficiency of the complaint, which was overruled. The defendant answered, denying nearly all the material allegations of the complaint, including the existence of the mortgage, and then set up affirmatively that the mortgage was taken upon a general stock of lumber, and that the mortgagors were allowed to sell the lumber so mortgaged in the usual course of business, which rendered the mortgage void. The plaintiff filed a reply, denying the material allegations of the answer, and then set up that the mortgagors had sold out of the stock, but that the lumber of which the conversion was alleged was still on the mill yard stacked and piled by itself, and also that the defendant took said lumber with express knowledge that it was covered by plaintiff's mortgage and expressly subject thereto.

The case comes here without a bill of exceptions. The notice of appeal alleges as error the overruling of the demurrer to the complaint, as well as exceptions reserved to the admission of evidence, and also to the instructions given to the jury. As there is no bill of exceptions, none of the errors assigned in the notice of appeal, which occurred in the progress of the trial, and to which exceptions

Opinion of the court — LORD, C. J.

were taken, can now be considered. Unless, therefore, the complaint is wholly defective, the judgment must be affirmed. The defendant contends that the complaint does not state facts sufficient to constitute a cause of action. The objection to it is that the description of the property in the mortgage is not sufficient. A description is sufficient if it may be aided by parol proof, and the identical property covered by the mortgage identified. Parol proof is admissible to apply the description, but not to enlarge it. The description itself is conclusive as to what it is, but outside evidence is admissible to apply the description to the property mortgaged. Cobbey, Chattel Mortgages, § 153. "It is not possible," Mr. Jones says, "to describe personal property so well as to preclude the necessity of such evidence to identify it. Thus, if a mortgage be made of a pile of wood upon a certain lot of land, upon which there are also other piles of wood, resort may be had to extrinsic proof to determine which pile was intended." Jones, Chattel Mortgages, § 64, and cases cited. The object of such evidence is to apply the description to the subject matter intended to be embraced in the mortgage, but not to contradict its terms, nor bring within its operation property not fairly included within it. Within this rule there can be no difficulty in applying the description to the identical property covered by the mortgage, and intended to be embraced within it. We think, therefore, that the complaint is sufficient. This practically ends the case. There was, however, some contention at the oral argument upon the part of the defendant that the mortgage was void for the reasons set up in the defense, but if the facts alleged in the reply, namely, that the defendant took the lumber expressly subject to the mortgage, were true, such a defense cannot be maintained: *Commercial Bank v. Davidson*, 18 Or. 57 (22 Pac. 517). That question has been passed upon by the jury, and their decision cannot be reviewed on this appeal.

Opinion of the court—BEAN, J.

While we regret that the appellant has been unable to try the error upon which it relied, for want of a bill of exceptions, as the record stands we find no error, and the judgment must be **AFFIRMED**.

[Decided June 29, 1893.]

BECKER v. MALHEUR COUNTY.

[S. C. 33 Pac. Rep. 543.]

24	217
28	240
28	487
33	144

WRIT OF REVIEW—BOARD OF EQUALIZATION—INFERIOR TRIBUNALS—PRESUMPTION OF REGULARITY.—The proceedings of a board of equalization, after it has acquired jurisdiction of a taxpayer, will not be set aside on writ of review because the record does not contain the evidence on which its findings of fact were based, unless it affirmatively appears in the record that the evidence was insufficient to sustain them. This is in pursuance of the rule that when inferior tribunals have once acquired jurisdiction every presumption exists in favor of the regularity of their proceedings.

Baker County: **MORTON D. CLIFFORD**, Judge.

Plaintiff appeals. **Reversed**.

Olmstead & Courtney, for Appellant.

C. A. Johns, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

This is an appeal from a judgment of the circuit court reversing and annulling on a writ of review the action and proceedings of the board of equalization of Malheur County in the matter of the assessment of the plaintiff's property for the year 1891. From the record it appears that on an examination of said assessment as returned by the assessor it satisfactorily appeared to the board of equalization that not all his property assessable in said county had been assessed, and that for the purpose of avoiding taxation, he had claimed and had been allowed a

Opinion of the court—BEAN, J.

deduction for an indebtedness of six thousand dollars as due and owing to the First National Bank of Baker City. A citation was thereupon issued and duly served upon him to appear before the board on the fifth day of September, 1891, and show cause, if any he had, why his assessment should not be corrected, and the sum of six thousand dollars claimed by him as indebtedness should not be disallowed and stricken out. The plaintiff appeared in person and by counsel at the time and place named in the notice, and objected to the board increasing the assessment of his property, or doing any act in the premises. This objection, the ground of which is not disclosed by the record, was overruled, and the board proceeded to hear the testimony of witnesses concerning the matter, and found that said indebtedness ought not to have been allowed, and that plaintiff was the owner of two hundred and fifty head of cattle, of the value of three thousand dollars, which had not been listed by the assessor, and thereupon ordered the claimed indebtedness for six thousand dollars to be stricken out, and the two hundred and fifty head of cattle to be added to the list of plaintiff's assessable property for the year 1891.

It thus appears that the only question on this appeal is whether the proceedings of a board of equalization, after it has acquired jurisdiction of the taxpayer, will be set aside and annulled on writ of review because the record does not contain the evidence on which its findings of fact were based. There is no provision of law of which we are aware making it the duty of the board to reduce to writing or preserve the evidence before it in the matter of the equalization of taxes, and, although it is an inferior tribunal, every presumption exists in favor of the regularity of its proceedings after it has once acquired jurisdiction: *Thompson v. Multnomah County*, 2 Or. 34; *Brown, Jurisdiction*, § 20; *Cent. Pac. R. R. Co. v. Placer County*, 32 Cal. 582. The record in this case recites that the correction in

Statement of the case.

the assessment of plaintiff was made after hearing and considering testimony, and in the absense of an affirmative showing in the record to the contrary, it must be presumed that such testimony was competent and relevant to the question then before the board.

It follows that the judgment of the court below must be **REVERSED**, and the proceedings of the board of equalization affirmed.

[Decided June 29, 1893.]

HUTCHINSON v. BIDWELL.

[S. C. 33 Pac. Rep. 560.]

INSOLVENT CORPORATIONS—FIDUCIARY RELATION OF DIRECTORS.—The directors of a corporation occupy a fiduciary position, and are bound to act with the utmost fidelity for the interest of the stockholders, or, in case the corporation becomes insolvent, for the interest of the creditors; they cannot deal with the corporate property in their personal capacity, nor make profit out of it.

IDEM.—The directors of an insolvent milling company leased the corporate property to themselves and operated the plant at a profit; *held*, that the directors are liable to account to the creditors of the corporation for the profits under the lease, but neither the wheat bought by the directors to be ground, nor the flour made from such wheat, is liable to attachment as the property of the corporation.

Union County: **MORTON D. CLIFFORD**, Judge.

Suit to enjoin the prosecution of an action in trover against a sheriff for taking property of Bidwell and others on an execution against the Union Milling Company. The basis of this suit is the claim that the property belonged really to the corporation, and that the Bidwell claim is fraudulent as a matter of law. Decree for defendants, and plaintiffs appeal. Affirmed.

Bailey & Balleray, for Appellants.

T. H. Crawford, and *Robert Eakin*, for Respondents.

Opinion of the court—Lord, C. J.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is a suit brought by James H. and W. R. Hutchinson, partners, to enjoin the defendants, H. P. Stewart, Frank Bidwell, M. S. Warren, and E. Kiddle, from prosecuting an action in trover against A. N. Hamilton, sheriff of Union County, for the value of one thousand sacks of flour, sold by him under an execution in favor of the plaintiffs against the Union Milling Company. At the time of the levy and sale, and prior thereto, the defendants had been the principal stockholders and directors of the Union Milling Company, and, as such, converted, it is alleged, in effect, a large amount of the property of such company to their own use for the purpose of hindering and defrauding its creditors. The object of the suit is to enjoin such action and to hold the defendants as trustees. Substantially the facts are, as found by the referee, that the plaintiffs are partners, doing business under the firm name of Hutchinson Brothers, and the Union Milling Company is a private corporation, operating a flouring mill; that between 1886 and May, 1888, the defendant company contracted indebtedness as follows: To the plaintiffs, in the sum of eight thousand dollars, and about nine hundred dollars; to the First National Bank of Union, five thousand dollars; to John M. Phy, three thousand dollars; to Caroline Blakeslee, two thousand six hundred dollars; to the firm of Noon & Co., seven hundred dollars; to J. W. Kennedy, seven hundred dollars; but of such indebtedness that of the First National Bank for five thousand dollars, and the plaintiffs for eight thousand dollars, were secured by a mortgage on the mill and the real estate upon which it is situated; that in September, 1888, Noon & Co., J. W. Kennedy, and Caroline Blakeslee, respectively, commenced an action in the circuit court against the milling company upon their claims as afore-

Opinion of the court—Lord, C. J.

said, and respectively recovered judgments therefor which are duly docketed in the judgment lien docket, and that thereafter execution was issued upon the judgment of J. W. Kennedy, and the said mill and real property were sold thereunder to John Phy, who held a subsequent judgment lien upon them for the amount of his claim, and received a sheriff's certificate of such sale; and that thereafter the said Phy, for a valuable consideration, assigned his certificate of sale and judgment to the plaintiffs and quit-claimed all his interest in the mill property to them.

About March, 1889, plaintiffs commenced an action against the Union Milling Company upon their claim of nine hundred dollars, and in September following obtained a judgment upon it which, with costs and disbursements, amounted in the aggregate to about one thousand dollars, but prior thereto the defendants became the owners by purchase of a majority of the stock of the milling company. In August, 1888, the defendants Stewart, Warren, and Bidwell, at a meeting of the stockholders, were elected directors of the company, and, as such, took charge of its business, but prior thereto the defendants Stewart and Warren had been directors of the company and had carried on its business under an arrangement with the stockholders whereby they agreed to advance the necessary funds to run the mill and to take warehouse receipts from the company to secure them, with the understanding that they should be reimbursed out of the first sale of the products of the mill. The mill was run under this arrangement for some time, and a large amount of indebtedness paid off out of the profits arising therefrom, but a number of actions having been brought against the company, and the defendants Warren and Stewart having refused to make further advances or purchase grain on their own account, it became impossible to operate the mill. The amount of money advanced and debts assumed by them for the company at this time was nine thousand three hundred and sixty-two

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dollars and thirty-five cents, and the amount of personal property belonging to the company, consisting of hay, horses, harness, wagons, wheat, flour, sundry accounts, etc., was valued at two thousand and eighty-three dollars. On the twenty-seventh of August, 1888, a meeting of the stockholders was called, after notice thereof, to determine what action the company should take under the circumstances; and at such meeting the board of directors stated to the stockholders that owing to the attachments then placed upon the mill property and the indebtedness of the company, they were unable to carry on the business, and that they must either rent the mill or close it up. The defendants Stewart and Bidwell proposed to lease the mill for a term of nine months, with the privilege of extending the lease to two years, and the meeting had been called to consider such proposition, when the secretary was authorized to lease the mill to the defendants Stewart and Bidwell for the sum of one hundred and fifty dollars a month; and thereafter the secretary executed said lease and the defendants took possession of the mill and operated it about eight months. Although the lease was made in the name of the defendants Stewart and Bidwell, the defendants Warren and Kiddle were interested in the same, and derived a profit therefrom of one thousand seven hundred dollars.

After the plaintiffs commenced their action against the company upon their claim of nine hundred dollars, they procured an attachment, and through A. N. Hamilton, the sheriff, attached and took from the possession of the defendants Stewart, Bidwell, Warren, and Kiddle one thousand sacks of flour containing fifty pounds each, etc. Said flour was the product of the mill while it was operated by the defendants, and was manufactured out of grain purchased and paid for by them. The defendants conducted and operated the mill under the lease with the knowledge of the stockholders and creditors of the com-

Opinion of the court—LORD, C. J.

pany. None of the acts complained of by the plaintiffs were fraudulent, nor were the plaintiffs in any way prejudiced or injured thereby. The flour, when it was taken by the said Hamilton, belonged to and was the property of the defendants Bidwell, Warren, Stewart, and Kiddle. On the fourth day of September, 1889, or about that time, said defendants commenced an action against the said Hamilton. As conclusions of law, the referee found that the plaintiffs had failed to prove the allegations of their complaint, and that the suit ought to be dismissed at plaintiffs' cost, and the defendants allowed to proceed with their action at law against the said Hamilton.

The contention for the plaintiffs is that the flour was the property of the milling company, and as such was liable to be seized by its creditors under any appropriate process and applied to the payment of its debts. The ground of this contention is that the acts of the directors in leasing the mill property to themselves, and applying its profits to the payment of indebtedness to some of their number, when the corporation was unable to continue its business, and was practically insolvent, were in violation of their fiduciary relation to the plaintiffs and other creditors, rendering the contract of leasing fraudulent and void as against them; and that, as a legal consequence, the flour manufactured under such lease, although out of grain bought by the defendants, became the property of the company, and subject to levy and sale for its debts, and the defendants became its creditors for the money advanced in the purchase of such grain. We do not think this position is tenable. "The law, for wise reasons," said Ross, J., "will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity": *Davis v. Rock Creek Min. Co.*, 55 Cal. 364. The directors of a corporation occupy a fiduciary position,—they are trustees and agents of the corporation and stockholders, and are governed by the same rules as are applied to the dealings

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of other persons holding fiduciary relations. They are subject to the strict rules which govern the relation of trustee and *cestui que trust* in all their dealings. "Agency," said BREWER, J., "implies trust, and no man may violate a trust": *National Bank v. Drake*, 29 Kan. 313. The doctrine rests upon the simple principal of common honesty. As a director holds a place of trust, he is bound to execute it with the utmost fidelity. He cannot legally exercise powers for his own personal ends and against the interest of his beneficiary. He cannot deal with the trust property in his personal capacity, nor make profit out of it, nor assume a position antagonistic to his fiduciary character. He cannot unite in himself the character of buyer and seller. Hence he must account for all profits improperly made, and for all moneys improperly received. As Mr. Perry says: "And so all advantages, all purchases, all sales, and all sums of money received by the directors in dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for such moneys or advantages received by reason of their position as trustees": 1 Perry, Trusts, § 207. When a corporation is insolvent and unable to carry on business, it holds its assets subject to the equitable claims of creditors. Its shareholders have no interest in the assets, as the payment of its debts will necessarily exhaust them; their equitable rights in the corporate property, owing to the company's insolvency, have been superseded by the equitable rights of the creditors. The effect, however, of the insolvency, is not to alter the legal ownership of the property, nor to prevent the directors or agents of the corporation from representing it and managing its property for all authorized purposes; but it does alter the equitable interest of the shareholders and creditors in the property, and places the directors in a fiduciary relation to its creditors. In consequence of this, they are bound to manage the assets, which they now hold

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in trust, with strict regard for the interest of the creditors. "They cannot," as Mr. Morawetz says, "give away property gratuitously, or sell it at a sacrifice in the interest of others, even with the consent of the shareholders, or in any manner use their powers for the purpose of obtaining an advantage for themselves." And again he adds: "Directors of an insolvent corporation who have claims against the company as creditors, must share ratably with the other creditors in the distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors, by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit": Morawetz, Corporations, §§ 787, 788.

From those considerations it will appear that when a corporation is unable to continue its business, and is in fact insolvent, its assets become a trust fund for the payment of its indebtedness, and the directors are only entrusted with its management for the benefit of its creditors; that they occupy a fiduciary relation to such creditors, and are governed in their dealings by the same strict rules as apply to other trust relations; that they are bound to manage the assets of the corporation with strict regard for the interests of its creditors, and must not allow their private interests to conflict with the discharge of their fiduciary duties; that they cannot use their powers for the purpose of obtaining an advantage to themselves, nor for securing any advantage or preference over other creditors, but that they will be held strictly accountable for all profits improperly made, or moneys improperly received or expended. As the stockholders have no beneficial interest in the assets of an insolvent corporation, they cannot be affected by the fraud of the directors in the management of its property, or in dealing with it in their personal capacity, or in using their powers for the purpose of obtaining some advantage to themselves, or some pref-

Opinion of the court—LORD, C. J.

erence over other creditors. In such case, the creditors alone are affected by the fraud of the directors, and they alone have an interest in avoiding their contracts or dealings, and in compelling them to account for the profits made or advantages gained. The plaintiffs, therefore, as creditors of the Union Milling Company, are entitled to bring a suit in equity against the defendants as its directors, to compel them to account for the management of its assets, or, if the defendants have been dealing with the trust property in their personal capacity, that is, have been operating the mill for their own private advantage, without regard to the interests of the creditors, to require them to account for the profits made by a violation of duty. The facts show that the defendants own nearly all the stock of the company, are its directors, and that the company is insolvent; that two of the defendants—Stewart and Warren—are, among others, its creditors; that the defendants called a meeting to consider the proposition of Stewart and Warren to lease the mill, and that such proposition was accepted, and a lease executed to them, although the two other defendants and directors—Kiddle and Bidwell—were interested in said lease; that they purchased with their own funds the wheat which was ground in the mill and manufactured into flour for market, and that the flour attached by the plaintiffs and sold by the sheriff, was the product of such mill, and was manufactured out of grain bought by them; that they operated the mill for about nine months and derived a net profit therefrom of one thousand seven hundred dollars, which was applied to the payment of the claims of the defendants Stewart and Warren; that they paid one hundred and fifty dollars a month rent for the mill, but the money so paid went immediately back to Stewart and Warren as creditors. From these facts the referee found there was no fraud, and that the suit ought to be dismissed, which the court confirmed.

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While there are many cases in which the courts refuse to tolerate or to inquire into the fairness of transactions entered into in violation of the rule that forbids a trustee from dealing with the trust property in his personal capacity, there are others which permit an investigation of such transactions, but impose upon the trustee or agent the burden of vindicating his dealings, and establishing their fairness and equity: Story, Agency, §§ 210, 211; Story, Equity Jurisprudence, § 322; 1 Perry, Trusts, § 209; Morawetz, Private Corporations, § 245; Angel & Ames, Corporations, § 233. But the authorities are clear that the directors cannot deal or contract with themselves in their personal capacity, and appropriate the profits arising from the transaction in payment of the company's indebtedness to themselves. Their powers are held for the benefit of all the creditors, and cannot be used for their own benefit or advantage. They are incapacitated as directors from using such powers for the purpose of obtaining an advantage to themselves, or securing preference over other creditors. The defendants as directors, by contracting with themselves in making the lease, were enabled out of the profits arising out of the trust property to pay much of the company's indebtedness to themselves, and thereby to obtain an advantage and secure a preference over other creditors.

There is another matter, not contained in the record, to which we feel bound to advert. In the course of his oral argument, one of the counsel for the defendants admitted in substance that the defendant Stewart had no interest originally in the company, but had loaned money to one of its stockholders, and had taken its stock as collateral; that the company having failed, the collateral became worthless, whereupon the owner thereof, being also insolvent, transferred the same to the defendant Stewart, and that it was in payment of this indebtedness in part to which the profits of the mill were applied. In

Opinion of the court—LORD, C. J.

this matter the defendant Stewart was not a creditor of the company, nor was the company indebted to him. Hence, it was not in paying the company's indebtedness to which the profits of operating the property were applied. If this be true, it only emphasizes all the more strongly the right of the creditors to have an accounting of the profits, and that they be ratably distributed. The creditors are the parties affected by the transaction, and they have a right to have it set aside, and to have an account for the profits realized.

But these conclusions are only applicable to a suit brought by the creditors to set aside a contract and compel the defendants to account for any profits derived from it, and that such profits, if there be any, be ratably distributed among the creditors of the company. Plaintiffs have brought no such suit, nor do they seek to accomplish such object by the one which they have brought. The object of their suit is to have the action at law to recover the value of the flour which was levied upon and sold perpetually enjoined, and the proceeds derived from its sale applied in payment of their judgment, and then whatever surplus shall remain or other profits there may be from the defendants operating the mill under the lease, that the plaintiffs have a decree applying a *pro rata* thereof on their demand of eight thousand dollars, and for this purpose that the defendants be declared trustees for the benefit of creditors. Unless, therefore, the flour which was attached and sold was the flour of the company, plaintiffs must fail in this suit, as they do not seek by it to have an accounting of the alleged illegal transaction for the purpose of ratably distributing its fruits or profits among its creditors. When profits are made by a violation of duty, the law will not permit the agent, for obvious reasons, to reap the fruit of his misconduct, but holds him as a trustee of such profits for the benefit of creditors. It is the fruit of the illegal transaction, the profits arising from it or an

Points decided.

advantage gained by it, which the suit must be brought to secure for a *pro rata* distribution among creditors, and to which the agent is bound to respond as trustee. The profits of the transaction, whether legal or illegal, are the gain or advantage realized after deducting the losses and expenses. Money advanced in buying wheat and manufacturing it into flour is an expense which must be deducted before the profits of the transaction can be ascertained for which the defendants are liable to account as trustees for the benefit of creditors; hence the wheat which the defendants purchased, or the flour into which it was manufactured by them, cannot be regarded as profits, or constitute the advantage derived from operating the mill under the lease, but either one or the other is to be considered as an expense and taken into account in ascertaining the profits. This being so, the expense of producing the flour stands to the credit of the defendants, as they are entitled to have it deducted in determining the profits derived from operating the trust property, it must therefore be the defendants' property and not the property of the company, and consequently not liable for attachment for its debts. In view of these considerations it follows that the plaintiffs are not entitled to have the action at law enjoined, nor to have the relief prayed for.

The decree, therefore, must be **AFFIRMED** and the **BILL DISMISSED**.

[Decided June 29, 1893.]

ALLEN v. DUNLAP.

[S. C. 33 Pac. Rep. 675.]

1. **MINE CLAIM — INJUNCTION — TRESPASS AND WASTE.** — To the general rule that equity will not grant an injunction in cases of trespass, there is an established exception in favor of mines, where injunctions will be granted to prevent the substance of the estate from being injured or carried away; and such a suit may be maintained by one in possession as a locator, under Rev. Stat. U. S. §§ 2319-2325, without first establishing, or attempting to establish, his title at law.

94	229
98	145
24	229
37	167
37	250
24	229
39	17
24	229
41	436
24	229
643	248
443	252
24	229
45	130

Statement of the case.

2. **MINES—NOTICE OF LOCATION.**—Posting a notice of location at the discovery shaft of a mine, and marking the boundaries of the claim by blazing the trees, squaring stumps, and driving stakes, is a sufficient compliance with the Rev. Stat. U. S. § 2324, providing that the location must be distinctly marked on the ground so that its boundaries can be readily traced.
3. **MINING CLAIM—NOTICE OF LOCATION.**—A notice of location of a mining claim alleging the location of one thousand five hundred linear feet, commencing at the notice, and running seven hundred and fifty feet in a southwesterly direction, and seven hundred and fifty feet in a northeasterly direction, with three hundred feet on each side, is not open to the construction of being seven hundred and fifty feet in one direction, and then back to the starting point.

Grant County: JAS. A. FEE, Judge.

This is a suit in equity by Edward C. Allen against James Dunlap to enjoin a trespass upon and waste of a quartz ledge, in a mining claim called the Black Butte lode or ledge, which plaintiffs claim to own by right of possession and location. Substantially the defense is, that neither the plaintiffs, nor their grantors, made any discovery of valuable mineral-bearing quartz in any ledge upon their pretended location of such mining claim, nor ever distinctly marked the boundaries of their pretended location of such mining claim, so that they could be readily traced and known, nor performed the requisite one hundred dollars' worth of work during each of the years from their pretended location of such mining claim to the commencement of this suit. The defendants then allege that they located a mining claim upon a vein or lode of gold-bearing quartz called the Hard Scrabble mine, which is situated on or near the Dunlap mine, and that they have fully complied in all things with the requirements of the law in the location of such mining claim, and that, at the time of the bringing of this suit, they were in possession of the same and engaged in working it. The defendants then allege that in 1885 they and others located a placer mine which was called the Dunlap mine, and that, at the time of the com-

Argument of counsel.

mencement of this suit, they were lawfully in the possession of it, and that the pretended Black Butte ledge mining claim, or the greater part thereof, namely, the west end thereof, is sought to be located on the prior location of the Dunlap mine; that the distance which the plaintiffs claim the Black Butte ledge to extend upon the Dunlap mine is unknown to the defendants for the reason that the location of the Black Butte ledge has never been marked on the ground so that its boundaries could be readily traced; that the location, as claimed by the plaintiffs, of the greater portion of the Black Butte ledge is on the location of the Hard Scrabble mine, but what proportion of the Black Butte ledge extends upon the Hard Scrabble mine is unknown to these defendants for the reason that the location of the Black Butte ledge has never been marked upon the ground so that its boundaries could be readily traced; that the plaintiffs are now claiming to be working the Black Butte ledge by sinking shafts, running cuts and tunnels, taking out ore, etc., all within the boundaries of the Hard Scrabble mine, and that neither of the plaintiffs own any interest in the Hard Scrabble mine, nor have they ever obtained any authority from these defendants to enter upon it. All the material allegations in the answer were denied in the reply and new matter set up by way of estoppel, to which we need not refer. The cause was referred to a referee, whose findings of fact and conclusions of law were in favor of the plaintiffs, from which the defendants have brought this appeal. Affirmed.

J. N. Brown, and D'Arcy & Bingham, for Appellants.

1. The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not even in granting a temporary injunction. There is an established exception, however, in the cases of mines, timber, and the like, in which injunction will be granted to restrain the con-

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tinued commission of acts by which the substance of the estate is destroyed or carried off, but when the plaintiff seeking an injunction in such cases claims to be the legal owner of the property he must show that he has established his title by the judgment of a court of law, or that he is prosecuting his suit at law and that the injury will be irreparable before he can obtain judgment, and in the latter case the court in continuing the injunction must make such order as will insure the speedy determination of the suit at law: *Irwin v. Davidson*, 3 Ired. Eq. N. Car. 311; *Lyon v. Wood*, 3 Leg. Gaz. 81; *Magnet Min. Co. v. Page*, 9 Nev. 348; *Lady Byron Min. Co. v. Lady Byron*, 4 Nev. 415; *Johnson v. Wide West Min. Co.* 22 Cal. 479; *Stevens v. Williams*, 5 Min. Rep. 449.

2. In Section 2324, revised statutes of the United States, we find the following: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." "All records of mining claims hereafter made shall contain the name or names of the locaters, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. Under that section the location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced: *Hanswirth v. Butcher*, 4 Mont. 307; *Hess v. Winder*, 30 Cal. 349, 354; *Holland and Tiley v. Mount Auburn Min. Co.*, 53 Cal. 149, 217; *Newbill v. Thurston*, 65 Cal. 613; *Durpat v. James*, 65 Cal. 555; *Taylor v. Middleton*, 67 Cal. 656; *Anthony v. Jilson*, 83 Cal. 396; *Gono v. Russel*, 3 Mont. 358, 363; *Darger v. Le Siener*, 30 Pac. Rep. 363.

Parrish & Cozard, and Bailey & Balleray, for Respondents.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. The first objection raised is as to the jurisdiction of equity to grant relief in cases of trespass and waste. The

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general rule that a court of equity will refuse to take jurisdiction and award even a temporary injunction in cases of a mere trespass, is conceded; but there is an established exception in cases of mines, timber, and the like, in which an injunction will be granted to restrain the commission of acts by which the substance of an estate is injured, destroyed, or carried away. In such case, the injury being irreparable, or difficult of ascertainment in damages, the remedy at law is inadequate. The defendants are not claiming that the remedy at law for the alleged trespasses committed and threatened is adequate, if the title or right of possession to the mining claim is in the plaintiffs. It is substantially conceded that, if such is the case, the injury is irreparable and the remedy at law inadequate. The contention of the defendants is that the title or right of possession of the plaintiffs to the mining claim is denied and contested, and that they must first establish such title or right by a judgment at law in ejectment, or for the recovery of its possession before a justice's court. This contention is manifestly grounded on the assumption that the plaintiffs are not in possession of the mining claim in question, and that the defendants are withholding its possession from them. All the cases cited and relied upon by the defendants are those in which title was involved. But there is no issue of title here by the pleadings or the facts, other than the possessory title acquired by location and possession. Under the statutes of the United States all valuable mineral deposits in land belonging to it are free and open to exploration, occupation, and purchase by its citizens, under the regulations prescribed therein, and by the local customs and laws of miners in the several mining districts so far as they are not inconsistent with the laws of the United States: Rev. Stat. U. S. §§ 2319, 2325. They provide the mode to be pursued in the location of such lands, and that the locators are granted the exclusive right of possession and enjoyment of the surface included within

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the boundaries of their location. The lands thus located are called mining claims, and the locators are spoken of as owners antecedent to the entry of the government patent. In explaining the nature of these rights, Mr. Justice BREWER said: "The statutes of the United States provide that upon performance of certain conditions, the discoverer of a mine becomes entitled to a patent. If all these conditions have been performed, the full equitable title is vested in the discoverer, and all that the government retains is the naked legal title, in trust for the equitable owner. If only partially performed, he has an absolute right of possession, and an inchoate title, which further performance will perfect and complete": *Aspen Smelting Co. v. Rucker*, 28 Fed. Rep. 221. Such a right of possession, or possessory title, is valuable and protected by law, but it is not declared by the statutes of this state to be real estate title.

The plaintiffs in their complaint claim the right to mine the Black Butte lode as owners thereof by virtue of location and possession, and set forth the particular facts upon which they rely to support their right. They then aver that while in the possession of the mine, and engaged in developing it, the defendants entered upon it with picks and shovels, and commenced to work thereon by proceeding to dig and uncover the ledge with intent to remove the mineral therefrom, and threatened to continue to dig and appropriate the valuable minerals of the mine to their own use, and to permanently deprive the plaintiffs of it; that they are insolvent; and that unless the defendants be restrained, the plaintiffs will suffer great and irreparable loss and injury. The Code provides that a justice's court has jurisdiction of an action at law to recover the possession of a mining claim, and that the complaint must set forth the facts constituting the plaintiff's right of possession, with such description of the mining claim as will be sufficient to identify it: Hill's Code, § 2175, *et seq.* By

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this provision a remedy is afforded at law to determine the right of possession, or the possessory title to a mining claim. But the facts indisputably show that plaintiffs are in possession of the mining claim. They are not seeking to recover it, but to protect it from the threatened waste and trespass which would despoil the mine of its valuable ore, and affect its substance. To defeat the plaintiffs' right of possession, and to establish their own, the defendants set up facts designed to show that the plaintiffs have not such right of possession, owing to defects in their location, and their failure to do the annual assessment work, and further set up their own location of the Dunlap and Hard Scrabble mines, a part of which is alleged to cover the mining claim in dispute. The defendants claim the right by location to do the acts alleged to be trespass and waste, and which affect the substance of the mining claim, and they insist that the plaintiffs shall establish their right of possession to the mining claim by judgment for its recovery before an injunction will issue, when the facts show that the plaintiffs are already in possession of it, and that the injury to it is irremediable at law. It is the defendants who are in a position to bring an action at law in a justice's court for the recovery of the mine, and to determine whether the right of possession is in the plaintiffs or themselves. It is the proper remedy for the defendants, if they wish to determine the possessory title. The plaintiffs cannot resort to it as they are in possession. The facts alleged show that the acts of trespass committed and threatened to be continued affect the substance of the mine and will cause irreparable injury unless restrained. It is said that the working of mines is something more than the common ordinary use of real estate, and requires the use of more than ordinary remedies to protect the rights of parties entitled to the possession: 15 Am. & Eng. Enc. 605. In aid of the action of trespass or waste, the foundation of the jurisdiction of a court of equity is in the

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probability of irreparable injury, and multiplicity of suits. In our judgment not alone the facts alleged, but the facts proven, show the case is a proper one for the jurisdiction of equity to award an injunction.

2. It is next claimed that there was no valid location of the Black Butte mining claim, for the following reasons: *First*, it is argued that there must be a discovery of a mineral-bearing ledge before there can be a location, and that the evidence is insufficient to show that the plaintiffs or their grantors discovered such a vein or lode. We think the evidence shows that prior to the location of the mine, the predecessors in interest of the plaintiffs discovered a ledge or lode of gold-bearing rock or quartz where the Black Butte mine is now situated, and that it is valuable, and probably capable of yielding large returns. The development so far, according to the testimony of several witnesses, indicates that there is a large body of ore, which being greatly decomposed, is easily worked, and is rich in gold. Of course mining property at this state of development is speculative in its character, and its value cannot be calculated with any degree of certainty, as the value of the ore beyond the point of development cannot be ascertained, but the indications are that the lode is rich in gold-bearing quartz. *Second*, it is claimed that there is nothing in the evidence to show that the plaintiffs or their predecessors in interest ever marked off the location of the Black Butte mining claim so that its boundaries could be readily traced. Section 2324, Rev. Stat. U. S. provides that "The location must be distinctly marked on the ground, so that its boundaries can be readily traced." The court below, in adopting the report of the referee, found that the boundaries of the Black Butte mine were well defined by blazed trees, stakes, and stumps of small trees,—the tops of the trees being cut off from four to six feet above ground, and the stumps squared, and that they can be readily traced. We think there was abundant evi-

dence to sustain the finding of the court on this point. The evidence shows that the Black Butte mine or lode of gold-bearing quartz was discovered by Dudley Curl in the spring of 1886; that he took as a partner one A. P. Lamb, and that they located the Black Butte mine by posting a notice of the location at the discovery shaft, and marked the boundaries of the claim by artificial monuments sufficient to give notice to any person of its boundaries. It also appears, especially from the early part of 1889, that the artificial monuments which marked the boundaries of the location of the mine are plain and visible, and are of a permanent character.

3. It is contended that the notice of location is defective and insufficient. The evidence shows that the notice which was posted at the discovery shaft and recorded in the records of Grant County, was as follows: "Notice is hereby given that the undersigned having complied, etc., has located one thousand five hundred linear feet on the Black Butte lode or ledge, situated in Fox Valley mining district, Grant County, Oregon, described as follows: Commencing at this notice and running seven hundred and fifty feet in a southwesterly direction, and seven hundred and fifty feet in a northeasterly direction; also claim three hundred feet on each side with all dips, spurs, and angles. This ledge or lode is situated on the Dud Curl and A. P. Lamb placer claim, situated at the head of Rich Gulch, just above John Harper & Co.'s placer claim." It is contended that this description would simply go seven hundred and fifty feet in a certain direction and back to the starting point, but this is not so. It is seven hundred and fifty feet from the notice in a southwesterly direction, and seven hundred and fifty feet from the notice in a northeasterly direction, which makes one thousand five hundred linear feet. The evidence also shows that there was no regular organized mining district in which the Black Butte mine is situated, and consequently it is not

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subject to any local laws or regulations, but the rights of plaintiffs are governed entirely by the statutes of the United States. Section 2324, Revised Statutes of the United States, does not require notice of a mining claim to be either posted or recorded, but entrusts that matter to local regulation, subject to the condition that when a notice is required to be recorded, it shall contain, among other things, a description of the property; (*Carter v. Baciagupi*, 83 Cal. 187;) so that there is no possible ground upon which to predicate the idea that the boundaries of the Black Butte mining claim are not described and marked off so that they can be readily ascertained and traced.

It is lastly alleged that the requirement of the statute that one hundred dollars in value of work and improvement to be done and made on the lode in each year has not been complied with. There was but slight reference to this point at the argument. We think, however, the testimony of Curl, Oak, Brown, and Allen shows that the plaintiffs and their predecessors in interest have performed work, and made improvements which are of the required value. We think that it is established that the Black Butte lode has been continuously worked by the plaintiffs and their predecessors in interest since its discovery, and that from the year 1889 the plaintiffs continued to develop it by expending much labor, time, and material.

As these were the only points relied upon, it results from these considerations that the decree must be **AFFIRMED**.

Statement of the case.

[Decided June 29, 1893.]

LOW v. SCHAFFER.

[8. C. 33 Pac. Rep. 678.]

24	239
25	559
26	678
27	86
24	239
27	243
24	239
30	93
24	236
31	80
32	435
24	239
34	92
24	239
37	534
24	239
39	86
39	70
24	239
46	66

1. **CONTINUITY OF ADVERSE POSSESSION—TACKING.**—Where several persons enter upon land in succession the several possessions cannot be tacked together so as to make a continuity of possession under the law of adverse title, unless there is a privity of estate, or the several titles are connected. *Rowland v. Williams*, 23 Or. 515, cited and approved.
2. **WATER RIGHTS—APPURTENANCES.**—A prior appropriator of the water of a stream, who has a possessory right to the real estate benefited thereby, may by parol transfer his interest in the land as well as his right to use the water; (*Hindman v. Risor*, 21 Or. 112, cited and approved;) the latter being considered simply as an improvement and passing with the land unless specially reserved.
3. **DECLARATIONS AS TO TITLE—EVIDENCE.**—Statements made by one in possession of land in assertion of his own title, are inadmissible against another claiming title thereto, if made in the latter's absence.
4. **WATER RIGHTS—PRIOR APPROPRIATION.**—An appropriation of the waters of a stream for a beneficial use, is an appropriation of all tributaries thereto above the point of original diversion, flowing in well-defined channels.
5. **QUIT-CLAIM DEED—BONA FIDE PURCHASER—NOTICE.**—One who takes by a quit-claim deed land on which are ditches then being used to divert water to the lands of another, is chargeable with notice of the latter's rights to the water, since the grantee in such a deed is never an innocent purchaser without notice. *Baker v. Woodward*, 12 Or. 6, cited and approved.
6. **WATER RIGHTS—APPROPRIATION—RIPARIAN PROPRIETOR.**—After the natural wants of a prior appropriator of the waters of a stream are satisfied, he, as a riparian proprietor, is not entitled to have the excess flow in the channel of the stream. Each riparian proprietor has the right to the ordinary use of the water flowing past his land to supply his natural wants, and he has the right to use a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors.

Baker County: MORTON D. CLIFFORD, Judge.

This is a suit by Leonard Low against Logan and Amanda Schaffer to enjoin the defendants from diverting the waters of Hill Creek, in Baker County, Oregon. It appears that the waters of the creek flow through defend-

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ants' land, and thence in a northeasterly direction through the plaintiff's adjoining land; that about one half of the volume of these waters is supplied from springs on defendants' land; that about 1868 plaintiff settled upon a tract of government land, and, after it had been surveyed and platted, he obtained the United States patent therefor; that at the time of his settlement he dug three ditches from said creek, and diverted and used all the water thereof to irrigate his arid land, and has ever since continued to so use it, except when diverted by others; that about 1876, one Martin Hill settled upon a tract south of and adjoining the plaintiff's said land, built a house and some fencing thereon, dug ditches from said creek and diverted and used the water to irrigate the cultivated portion of it, and continued to use the water for that purpose until about 1880, when he transferred his possessory right and improvements upon said land to plaintiff, who continued to irrigate it by the water of said creek until about 1884, when, by a bill of sale, he transferred the possessory right and improvements on said land acquired from Hill to one Thos. Huffman; that Huffman went into possession of said premises, diverted and used the water of said creek, and irrigated the land therewith until about 1885, when one Oscar Hindman contested his right thereto before the local land officers, and as a result of the contest secured the land and obtained a patent from the United States therefor; that Hindman diverted and used the waters of said creek, and also diverted and used the waters from three springs on said tract which were tributaries of said creek, to irrigate his land, and in May, 1890, and after he had made final proof in support of his claim, he conveyed it to the defendants, who went into possession, and have since that time diverted and used the water appropriated by Hindman to irrigate their land; that the lands of both plaintiff and defendant are dry and arid, and without water are nearly valueless, but by irrigation are

made to produce excellent crops; that another stream, known as Alder Creek, flows through plaintiff's land and serves to irrigate the whole tract except about ten to fifteen acres which has been irrigated from the water of Hill Creek.

The plaintiff alleges a prior appropriation of the water of Hill Creek; that he is a riparian proprietor on said stream, and that the water thereof is necessary for his use. The defendants, after denying the allegations of the complaint, for a separate defense allege an adverse user of the water of said creek by themselves and their grantors and their predecessors since 1876; and for a further separate defense allege that plaintiff was one of their grantors and predecessors in interest, and that such water was not necessary for his use, but that he desired it for speculation. The reply denied the allegations of new matter in the answer, and the issues having been completed the testimony was taken by a referee, and the court found that the equities were with the defendants and decreed to them twenty inches of the water of said creek, from which decree the plaintiff appeals. Reversed.

D. D. Williams, for Appellant.

Olmstead & Courtney, for Respondents.

MR. JUSTICE MOORE delivered the opinion of the court:

1. The evidence conclusively shows that plaintiff was the prior appropriator of the water of said creek, and that he had diverted and used it for more than ten years prior to Hill's diversion; and, as a consequence, he is entitled to the use thereof unless he had lost it by an adverse user or by abandonment. To constitute an adverse user of more than ten years the defendants must necessarily tack the use of Huffman to that of Hindman, their grantor. Continuity of use is an essential element of an adverse title. When several persons enter upon land in succession, the

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several possessions cannot be tacked so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterwards by another, wrongfully, constitutes a new disseisin: *Melvin v. Proprietors*, 5 Met. 33 (Mass.). The possession of a landlord and his tenant, an ancestor and his heirs, a vendor and vendee, may be tacked to complete the bar of the statute of limitations: *Rowland v. Williams*, 23 Or. 515, (32 Pac. Rep. 402). If there has been any break or interruption in the use, the several uses cannot be tacked so as to make it continuous. If Hill's use in 1876 had been adverse to plaintiff's claim, when in 1880 he transferred his possessory right and improvements to the plaintiff, he thereby restored plaintiff to his original claim. Admitting that plaintiff transferred his possessory right to Huffman more than ten years prior to the commencement of the suit, Hindman could not tack his possession to that of Huffman, since there was no privity of interest or of estate between them; and Hindman did not take the title from Huffman as a tenant, heir, or vendee, but by an independent title from the government, and hence the defense or adverse possession must fail.

2. A prior appropriator of the water of a stream, who has a possessory right to the real estate benefited thereby, may, by a parol transfer, assign his interest in the land as well as his right to the use of the water appurtenant thereto. The water appropriated for irrigation is as much a part of the improvements as his buildings and fences, and the transfer of the possessory right to the land carries with it the water so appropriated, unless expressly reserved: *Hindman v. Rizor*, 21 Or. 113 (27 Pac. Rep. 13). The verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment thereof, (*Smith v. O'Hara*, 43 Cal. 371,) and he could not thereafter reassert his original right to the same against another

appropriator: Pomeroy, Riparian Rights, § 88. The plaintiff could not be deprived of his use unless there was a manifest intention upon his part to abandon it, and this intention must be determined from his declarations and acts in relation thereto: *Dodge v. Marden*, 7 Or. 460. It appears that Hill had diverted and used the water from Hill Creek to irrigate his crops, and that plaintiff, while he claimed the possessory right thereto, had also used the water for that purpose. It appears that the bill of sale evidencing the transfer of the possessory rights from plaintiff to Huffman was left with Huffman's attorney, and was not offered in evidence. While plaintiff occupied and cultivated the land now owned by the defendants he never used the water from Hill Creek to irrigate the crops growing thereon, except in the early season when there was an abundance of water in the creek; thus showing that he considered and treated this tract as a servient estate to his own lying below, and that Huffman, while he occupied it, never used water thereon except by the plaintiff's permission, and then only when it was abundant. The plaintiff testifies that he never sold or assigned to Huffman the right to use any water from the creek, and in this he is corroborated by the testimony of Huffman, who swears that he never purchased any water rights thereon, or used any water except by plaintiff's permission. This evidence rebuts the presumption that plaintiff abandoned the use of the water. There could be no such abandonment without an intention on plaintiff's part to that effect, and his intent is to be gathered from his acts: *Mallett v. Mining Co.* 1 Nev. 188. It is quite apparent that the plaintiff never abandoned or intended to abandon his right to divert and appropriate the water of Hill Creek, and that he was not one of the defendants' grantors, or predecessors in interest.

3. Some testimony was offered which tended to show that Huffman said he "had it in black and white" that

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plaintiff assigned the water to him. These statements were made in the absence of plaintiff, and cannot effect his testimony on that subject. The declarations of a grantor as to the condition of his title may be offered in evidence to affect the grantee, (Hill's Code, § 685,) but the declarations of one person in possession of land in assertion of his own title are inadmissible, if not within the rule of *res gestæ*: Rice, Evidence, § 238.

4. The law regards that appropriation which is first in time to be prior in right, and such appropriation constitutes a vested right which the courts will protect and enforce. When the waters of a stream have been appropriated for a beneficial use, it is an appropriation of all the tributaries thereof above the point of original diversion: *Malad Valley Irr. Co. v. Campbell*, 2 Idaho, 387 (18 Pac. 52). If the water from tributaries could be diverted it would destroy or impair the original appropriation: *Strickler v. City of Colorado Springs*, 16 Colo. 61 (26 Pac. 313); *Strait v. Brown*, 16 Nev. 317. The testimony of the plaintiff and his witnesses shows that the springs upon defendants' lands discharged their waters into Hill Creek by well-defined natural channels, while the defendants and their witnesses testify that there are no natural channels therefrom, but that the water percolates through the soil, and ultimately reaches the creek. The referee and court, however, have found that these springs are tributaries to said creek, and flow in well-defined channels, and that the diversion of the waters of said springs deprives plaintiff of the use thereof, to which he is entitled by reason of his prior appropriation.

5. The defendants claim that when they bought their land the water was being diverted from the creek and springs, and flowing in the ditches upon the land, and in use for purposes of irrigation by their grantor. The evidence shows that before they purchased the property they examined it, and would not have bought it but for the

water rights supposed to be appurtenant to it. The record also shows that the defendants accepted a quit-claim deed from the grantor; that the plaintiff's ditches were constructed on their land, and were diverting water from the creek, and hence it cannot be said that they were innocent purchasers for a valuable consideration without knowledge or notice; (*Baker v. Woodward*, 12 Or. 3; 6 Pac. Rep. 173;) and defendants must therefore be presumed to have purchased with knowledge of plaintiff's rights in the premises: *Coffman v. Robbins*, 8 Or. 278.

6. Plaintiff contends that because he is a riparian proprietor of Hill Creek, and made a prior appropriation of its waters, he is thereby entitled to the flow of water in the stream in excess of his appropriation; that as a prior appropriator he can divert the quantity necessary for his use, and then claim the right as a riparian proprietor to have the surplus water flow in the channel, notwithstanding the fact that defendants are riparian proprietors above him. Each riparian proprietor has the right to the ordinary use of the water flowing past his land for the purpose of supplying his natural wants, even if it take all the water of the stream to supply them. He also has the right to use a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors. A diversion of water for irrigation is not an ordinary use, and can only be exercised reasonably and with proper regard to the rights of the other proprietors to apply the water to the same purposes: *Gould, Waters*, § 205; *Pomeroy, Riparian Rights*, § 125; *Jones v. Adams*, 19 Nev. 78 (6 Pac. Rep. 442); *Elliott v. Fitchburg R. R. Co.* 10 Cush. 194; *Coffman v. Robbins*, 8 Or. 278. Prior appropriation, under the doctrine of the Pacific Coast states, is a paramount right, and the rule stated above must be held to apply only after such appropriation for natural wants has been made, when the riparian proprietor will be entitled to a reasonable use

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of the water for irrigation. It should be presumed that the prior appropriator, when he makes his appropriation, has taken enough water to supply his natural wants as well as his beneficial use. If his natural wants are supplied, and he has sufficient water for his beneficial use, he ought not to complain because others above divert the water. His right of action is based upon his injury, and if his wants are all supplied he cannot be injured. What constitutes a reasonable use depends upon a number of circumstances: upon the subject matter of the use itself, the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts: *Pomeroy, Riparian Rights*, § 125. To hold that after the needs of a prior appropriator had been supplied, he, as a riparian proprietor, was entitled to the flow of the excess beyond his appropriation in the channel of the stream, would be to deny all subsequent appropriations. Such a rule would destroy the very object for which the theory of irrigation was established, and would give the prior appropriator the use of all the water of a stream, without regard to its size or capacity. Plaintiff, by reason of his prior appropriation, was entitled to the amount of water originally appropriated, and had he then taken all the water from the creek, his rights would be respected and maintained. He is entitled to have the water flow in the channel at the head of his ditches to the extent of his appropriation, and when the defendants and their grantor acquired this land they took the same subject to such prior appropriation: *Kaler v. Campbell*, 13 Or. 596 (11 Pac. Rep. 301). The plaintiff's rights are to be measured by his appropriation, and the defendants, being riparian proprietors, are entitled, after such appropriation, to a reasonable use of the water. It appears that there are about ten acres of plaintiff's land which cannot be irrigated from the waters of Alder Creek, and must be irrigated, if at all, from the waters of Hill Creek, and

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hence he is entitled to a sufficient quantity from that creek for this purpose. The evidence shows that from one half inch to three inches is a sufficient quantity to properly irrigate one acre of land, and that in all probability plaintiff's whole tract can be irrigated from Alder Creek, except about ten acres, and that one inch per acre is sufficient for that purpose, and that this quantity is the measure of his right.

The decree of the court below must, therefore, be REVERSED, and one entered here giving plaintiff ten inches of the water of Hill Creek at his point of diversion, and perpetually enjoining the defendants from diverting any of the portion thus awarded the plaintiff.

[Decided June 29, 1893.]

VAN VOORHIES v. TAYLOR.

[S. C. 33 Pac. Rep. 380.]

24	247.
133	445
33	446.

JUDGMENT—DECREE—ORDER DISSOLVING ATTACHMENT—CODE, §§ 535, 545.—

An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment, decree, or final order from which an appeal will lie under Hill's Code, § 535.

Union County: JAS. A. FEE, Judge.

This is an action brought by A. A. Van Voorhies against E. G. Taylor, E. E. Taylor, and G. G. Taylor to recover nine hundred and ninety-two dollars and fifty-seven cents upon three promissory notes. An affidavit for an attachment, alleging that the payment of said sum had not been secured by any mortgage, lien, or pledge upon real or personal property, was filed, together with an undertaking therefor. A writ was thereupon issued and the defendants' property attached. The defendants, after demurring to the complaint, filed a motion to dissolve the attachment for the reason that a note for seven hundred

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and fifty dollars had been pledged as collateral security for the payment of the notes upon which the action was brought. This motion was supported and resisted by affidavits and exhibits, whereupon the court granted the motion, and made an order dissolving the attachment, from which order the plaintiff appeals. Dismissed.

J. W. Shelton, for Appellant.

Jas. D. Slater, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

Will an appeal lie from an order dissolving an attachment, when no judgment has been rendered in the action, is the question presented by this record. • An attachment is an auxiliary proceeding of statutory origin. A dismissal of the action or a judgment for the defendant necessarily dissolves it, but a dissolution of the attachment, while it may have the effect of rendering the judgment valueless, in no way affects the action. Attachment proceedings are purely statutory, and, as no appeal from an order allowing or denying a motion to dissolve an attachment is prescribed thereby, it cannot be entertained, unless it can be deemed a final order. Section 535, Hill's Code, provides that judgments and decrees may be reviewed, and defines a final order from which an appeal may be taken; and section 545 provides that upon appeal the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment or decree appealed from. In *Crawford v. Roberts*, 8 Or. 324, this court held that an appeal from the judgment upon the merits brought up a motion to dissolve the attachment. This was followed in *Sheppard v. Yocum*, 11 Or. 234 (3 Pac. Rep. 824), in which LORD, J., says: "Upon principle, it would seem, when property has been wrongfully seized by attachment, the defendant ought not to be deprived of the right of

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appeal in the event the order of the court below should be against him, otherwise he might be subjected, in some instances, to great and irreparable injury." Judgments upon the merits had been rendered in these cases, and the conclusion reached is fully warranted by section 545. The defendant against whom a judgment upon the merits had been rendered might have no valid defense to the action, and yet if property had been attached which was exempt, and his motion to dissolve the attachment had been denied, he would have the right to appeal from the judgment after it had been rendered, to try the question raised by his motion. The authorities upon the question of the right to appeal from an order dissolving or refusing to dissolve an attachment are not uniform, but the weight is against such an appeal: Elliot, Appellate Procedure, § 81. "There can be no appeal from an order in an attachment proceeding until after final judgment in the main action, and then only in connection with the judgment in such main action": *State v. Miller*, 63 Ind. 475; *Snavely v. Buggy Co.* 36 Kan. 106, (12 Pac. 522); *Forbes v. Porter*, 23 Fla. 47. An order dissolving an attachment cannot be denominated a judgment or decree within the meaning of section 535. The judgment relates to the cause of action made by the complaint, while the attachment proceedings are only auxiliary thereto. The statute not having provided for an appeal in such cases, and not being a final order in the action, the appeal must be DISMISSED.

 Opinion of the court—MOORE, J.

[Decided June 29, 1893.]

NODINE v. SHIRLEY.

[S. C. 33 Pac. Rep. 379.]

Union County: JAMES A. FEE, Judge.

This is an action brought by Fred Nodine against J. Q. Shirley for an alleged balance due on account. The cause was referred to take the testimony, compute the account, and report the findings of fact and conclusions of law thereon. The referee found that there was due from the defendant to the plaintiff seventeen thousand three hundred and fifty dollars and sixty cents, and that said plaintiff was entitled to a judgment for this sum. The court at the hearing approved these findings and conclusions, and judgment was rendered for said sum, and for the costs and disbursements of the action, from which judgment the defendant appeals. Modified.

Lewis L. McArthur, Bailey & Balleray, Johns & Rand,
and *J. W. Shelton*, for Appellant.

A. J. Lawrence, and *T. H. Crawford*, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

An examination of the errors assigned shows that the plaintiff failed to demand interest in his complaint and that the referee found he was entitled to interest in the sum of ten thousand nine hundred and thirty dollars and sixty-five cents. It also appears that on April 7, 1884, the plaintiff sold and delivered to the defendant a band of cattle for the sum of twenty thousand eight hundred and twenty-five dollars, which formed the principal upon which the interest was computed, and that from an examination of the account it appears that at the time of said sale the plaintiff was indebted to the defendant, and that the

24	250
30	373
24	250
34	557
24	250
40	888
24	250
48	814

Statement of the case.

defendant on April 9, 1884, paid to the plaintiff ten thousand dollars; April 26, one thousand dollars; and May 1, ten thousand dollars, thus fully paying the whole claim, and for these reasons no interest should be allowed.

It also appears that the referee had allowed the plaintiff four thousand five hundred dollars for pasturing stock, and that this stock was owned by the plaintiff and defendant as partners, and for that reason should not have been allowed in this action. The judgment of the court below will be modified, and as there is no dispute upon the facts, a judgment will be there entered for the amount of the judgment in the court below less these two items, or for the sum of one thousand nine hundred and nineteen dollars and ninety-five cents. **MODIFIED.**

[Decided June 29, 1893.]**THOMAS v. THOMAS.**

[S. C. 33 Pac. Rep. 565.]

34	351
128	386
29	123

1. **EQUITY — ASSIGNABILITY OF CONTRACT FOR SUPPORT BETWEEN FATHER AND SON — FORFEITURE.**— Where a son, as a part of the consideration for a deed from his father, agrees to give the latter an annuity, and a home on the land granted, he cannot, without the father's consent, convey the land to another, even if the latter agree to perform the son's covenant, since the obligation of the son is personal; and such a conveyance works a forfeiture of the son's estate.
2. **TAXATION OF COSTS — CODE, § 557.**— Under section 557 of Hill's Code it is the duty of the trial court to make findings of fact upon each item of costs in dispute, and this must be done before the appellate court can consider the correctness of the taxation.

Union County: **MORTON D. CLIFFORD, Judge.**

The object of this suit is twofold — *First*, to cancel and set aside a conveyance of certain lands by the plaintiff, Israel Thomas, to his son S. K. Thomas, and the deed from S. K. Thomas to his co-defendant, Delaney; *second*, for a decree making the deferred payments upon certain

Statement of the case.

other lands sold by the plaintiff to the defendants a lien upon the lands. From the pleadings and the evidence upon the first cause of suit it appears that on January 5, 1889, the plaintiff, who was then about seventy-five years old, and without any one to care or provide for him in his old age, being desirous of distributing his property among his children, and providing for his own support and maintenance during his life, conveyed the property in controversy, upon which he then resided, to his son Squire, one of the defendants. The consideration, as stated in the deed, was two thousand dollars, but the real consideration was an agreement on the part of Squire to pay four of plaintiff's other children the sum of two hundred dollars each, in accordance with the terms of his promissory notes therefor, executed and delivered to plaintiff, and an agreement in writing, executed contemporaneously with the deed, and forming a part of the same transaction, by the terms of which Squire covenanted and agreed with plaintiff to furnish him a home and support on the land so conveyed, so long as he might live, and to pay him two hundred dollars as an annuity during his life. The several sums evidenced by the promissory notes drawn in favor of plaintiff's children were intended by him at the time of the conveyance as gifts or advancements to his children, but none of the notes have ever been delivered to the persons for whom intended, although the defendant paid to the payee of one of them the sum of one hundred and forty dollars, obtained the note from plaintiff and canceled and destroyed the same. The remainder of the notes were brought into court by the plaintiff for the purpose of being surrendered up and canceled.

From the time of the execution of the deed and agreement up to December 30, 1890, plaintiff and his son continued to reside together on the farm, and the latter substantially fulfilled the agreement on his part, except that he paid only thirty-five dollars on the annuity. On

Argument of counsel.

that date he sold and conveyed the farm to defendant Delaney for the sum of four hundred dollars in money, and an oral agreement on the part of Delaney to pay the notes in favor of plaintiff's children when the same should become due, and to support and maintain plaintiff on the farm during his life. On January 21, 1891, plaintiff learned, for the first time, as he claims, of the conveyance to Delaney, and brought this suit to set aside and cancel the deed to his son, and the deed from his son to Delaney, alleging, among other things, that his son had failed and neglected to pay either or any of the annual installments, or any part thereof, except the sum of thirty-five dollars, and that the deed to Delaney was made without his knowledge or consent, and for the purpose of cheating and defrauding him out of his home, and offering in the complaint to return the one hundred and seventy-five dollars paid on the consideration for the deed. A decree was rendered in plaintiff's favor in the court below, on the referee's report of A. S. Laurence, Esq., from which defendants appeal. Modified.

Chas. H. Finn, for Appellants.

Even admitting the allegations of hardship, the age of the grantor, and his illiteracy, yet in the absence of allegations and proof that the grantor was not possessed of his faculties, was not imposed upon, or that he did not sell the property for less than its real value, a court of equity has no power to set aside the deed or rescind the contract. Neither courts of law nor of equity have the right to enforce mere moral obligations: *Sobranes v. Sobranes*, 31 Pac. Rep. 910; *Ralston v. Turpin*, 129 U. S. 675; *Sausley v. Jackson*, 16 Tex. 581. For the relief sought in this suit plaintiff might maintain an action of ejectment or suit charging a lien on the land, but a rescission of the contract or forfeiture of title is not the relief or proper method. No fraud is alleged in this cause to induce the deed sought to be

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avoided, nor was the same alleged to have been obtained through the mistake or any accident on the part of the plaintiff grantor: *Watson v. Smith*, 7 Or. 454.

Either the deed itself or some contemporaneous writing accompanying the same and construed to be part of said conveyance must explicitly provide the right of reëntry upon condition broken; and unless such provision appears in the writing in clear terms, such as "on condition," "providing always," "if it appears," "if it shall appear," etc., the land cannot be compelled to revert—the remedy is for damages for the failure of condition on or for the condition unbroken: *Berkely v. Union Pac. Ry. Co.* 33 Fed. Rep. 794; *Coffin v. City of Portland*, 16 Or. 77; *Raley v. Umatilla Co.* 15 Or. 174; *Portland v. Terwilliger*, 16 Or. 465; *Mays v. St. Louis, etc.* 21 N. E. Rep. 487.

What is such a contemporaneous contract as to control a deed? Contract prior to the execution of the deed is not a contemporaneous one, and will not affect the deed unless the deed expressly refers to it and its terms: *Douglas v. Mut. Life Ins. Co.* 20 N. E. Rep. 52; 127 Ill. 101.

Restrictive clauses in a deed or contemporaneous contracts create covenants running with the land simply, and are not conditions subsequent: *Past v. Wells*, 22 N. E. Rep. 144; 115 N. Y. 361; *Same v. Bernheimers*, 22 N. E. Rep. 149; 115 N. Y. 664.

Robert Eakin, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

1. A careful examination of the question has satisfied us that the decree, so far as the first cause of suit is concerned, should be affirmed. The contract of the defendant, S. K. Thomas, to give his father a home and support upon the land, as a part of the consideration for the conveyance, was a personal obligation, to be performed by him alone, and could not be assigned, without the consent

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of the father, so as to substitute some other person in his place. The principal consideration for the deed to the son was the support and maintenance of the plaintiff upon the farm during his old age, by one of his own flesh and blood, and not by a stranger. His object was to have his son reside with and take care of him during the remainder of his life, on the premises conveyed. This was the motive which prompted him to make the conveyance, and the condition upon which it was accepted. The sale of the land by the son puts it out of his power to comply with the condition upon which he was to receive the title, and utterly defeats the object sought by plaintiff in making the conveyance, and therefore works a forfeiture of the estate. Any other rule would destroy the very purpose of the grant, and render the grantor dependent for his support and maintenance upon the pleasure and convenience of successive assignees, whether agreeable to him or not. Nothing can be more effectual, in securing the faithful performance of a contract of this kind, than the right of the parent to revest the entire estate in himself upon a breach by the son, in putting himself in a position where he is unable to comply with his contract. The rule which holds the child to a strict performance of his part of the contract, and gives the parent the right to recall the gift if he fails, is founded upon obvious principles of justice and right, and is the only rule, it seems to us, which will preserve the rights of a parent who enters into a contract of the character now under consideration. The books abound in illustrations of the distressing family discords and lawsuits which seem almost invariably to spring from a disregard of the advice of the son of Sirach: "Give not thy son and wife, thy brother and friend, power over thee while thou livest, and give not thy goods to another, lest it repent thee, and thou entreat for the same again. As long as thou livest and hast breath in thee, give not thyself over to any. For better it is that thy

Opinion of the court—BEAN, J.

children should seek to thee, than that thou shouldst stand to their courtesy. In all thy works keep to thyself the pre-eminence, leave not a stain in thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance": Ecclesiasticus, xxxiii: 19-23. And the courts have always been zealous in demanding and requiring a strict performance by the child, and to that end have held that the duty to support the parent under a contract of this kind is a personal one, and cannot be transferred to a third person without the consent of the parent, and an attempt to do so gives the parent the right to revest the entire estate in himself.

In *Clinton v. Flye*, 10 Me. 292, (which was a writ of entry brought against the defendant as assignee of one Roundy), a contract had been made by the plaintiff and Roundy, by which it was agreed that Roundy should support and maintain his father and mother and an idiotic brother during their natural lives, for which the plaintiff agreed to give him the use and occupancy of a certain farm during the lives of the father and mother, and at their death to give him a deed to the land. It was held that the contract was a personal trust, unassignable, and the plaintiff recovered the land from Roundy's grantee, the court saying: "If the contract is held assignable, they (the persons to be supported) are liable to be transferred, at the convenience and pleasure of successive assignees, whether they possess, or not, the temper and qualities which would enable them satisfactorily to fulfill the trust." So, also, in *Flanders v. Lamphear*, 9 N. H. 201, the plaintiffs gave a deed to their son, and he gave back a mortgage conditioned for the support of the grantors during their natural lives, and to pay sundry debts of the father. Subsequently, the son conveyed the premises to a third person, and they were again transferred so that Lamphear, the defendant, had them by mesne conveyance from the son. The plaintiffs then brought a writ of entry again:

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Lamphear, and it was decided that it could be maintained unless it could be shown the conveyance of the son was made with the consent of the plaintiffs. In *Eastman v. Batchelder*, 36 N. H. 141, Batchelder gave a deed of his real estate to Trasker, his son-in-law, upon the condition and consideration that he and his wife should be supported on the premises during their lives by Trasker, the object being to have their daughter and her husband reside with and take care of them in their old age. On a bill in the nature of a suit to redeem, and to be let into possession, brought by the purchaser of Trasker's right at an administrator's sale of his estate, it was held that, although he offered to perform the conditions of the contract, the suit could not be maintained, because the contract for the support of Batchelder was personal to Trasker, and could not be performed by his assignee, and that neither Trasker nor the administrator of his estate could transfer the premises and his responsibilities, nor could his creditors, before his decease, have deprived him of the land, and retained it against Batchelder. To the same effect are *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34; Jones, Mortgages, §§ 388, 392; *Daniels v. Eisenlord*, 10 Mich. 454.

It was claimed at the argument that the sale to Delaney was made with the knowledge and acquiescence of the plaintiff, but in our opinion the evidence fails to sustain the contention. Plaintiff testifies that the first knowledge or information that he had of the sale, or contemplated sale, was from Delaney, after the deed had been made, and but a few days before this suit was commenced. The only evidence to the contrary is the testimony of the two defendants who are to be benefitted by the sale, if sustained, and their evidence is only to the effect that the contemplated sale was talked over by them in the presence of the plaintiff, and he made no objection thereto; but they do not testify that he was ever consulted about the matter, or

Opinion of the court—BEAN, J.

knew anything about the terms and conditions upon which the sale was to be made, or that he ever agreed or consented that it might be made, and the obligation of his son transferred to Delaney. Upon this evidence the court would not be justified in holding that the transfer was made with his consent.

The second cause of suit is to enforce a grantor's lien for the unpaid purchase price of certain land sold and conveyed by plaintiff to the defendants jointly, the consideration for which was evidenced by promissory notes payable to certain of plaintiff's children, but never delivered by him. The first of these notes matured January 1, 1890, and was paid before the commencement of this suit. The second note became due on January 1, 1891, and while it was not paid at the commencement of this suit, the evidence shows that defendants made every reasonable effort to pay it, by tendering and offering to pay the same to both the plaintiff and the payee named therein. The other notes were not due at the time this suit was commenced, and hence there was no default on the part of the defendants; and as to this cause of suit the complaint must be dismissed, conceding, but without deciding, that the doctrine of a grantor's lien prevails in this state.

2. There is also an appeal from the action of the court below on a motion for the retaxation of costs. After issue joined, this cause was referred to a referee for trial, and a stenographer appointed by the court to take the testimony under his direction. The referee charged for seven days' services in hearing the testimony and arguments of counsel, and one and one half days' for the examination of the case and the preparation of findings, at twenty dollars per day, making a total of one hundred and seventy dollars, one half of which is alleged to have been actually paid by plaintiff and is included in his cost bill as filed. The stenographer charged for six days' services in taking testimony at ten dollars per day, and fifteen cents a folio for

Opinion of the court—BEAN, J.

transcribing five hundred folios of testimony, and ten cents a folio for two copies thereof, making a total of one hundred and eighty-five dollars, of which eighty-four dollars and fifty cents is alleged to have been actually paid by plaintiff, and is included in the cost bill. Objections were filed by the defendants to the allowance of sundry items of the cost bill, and particularly to the items for referee's and stenographer's fees, which objections were overruled by the clerk. On a motion to retax the costs the court below allowed for the services of the referee forty-two dollars and fifty cents, being one half of his compensation, at the rate of ten dollars per day, and for the stenographer sixty-seven dollars and fifty cents, being one half of his fees as allowed by the court below.

It appears from the objections to the cost bill, and affidavits in support thereof, that the objection to the allowance of the items for referee's and stenographer's fees is based upon the fact, as claimed, that the referee was actually engaged only five and one half days in the trial of the cause, and had already exacted from defendants, and required them to pay, sixty-five dollars before he would report their part of the testimony, and that this length of time was made necessary by the fact that the referee permitted and allowed the stenographer to take the testimony on a typewriter, instead of in shorthand, and thus prolonged the hearing, and increased the per diem of both the referee and stenographer largely in excess of what it would otherwise have been; and that the stenographer was only entitled to ninety dollars for taking and extending the testimony, and defendants had already paid him seventy dollars, which he demanded before he would allow their testimony to be filed. If these objections are well founded, they certainly should have been sustained. The referee was entitled to his compensation only for the time actually and necessarily spent in the business of the reference, and, having been provided with a stenographer, he

Opinion of the court—BRAN, J.

could not, by resorting to the device of allowing and permitting the testimony to be taken on a typewriter, so increase his or the stenographer's per diem beyond what it would have been had the evidence been taken in shorthand. Such a practice finds no sanction or authority in the law, is in open and flagrant violation of the rights of the litigants, and ought to receive the prompt and vigorous disapproval of the court. The legitimate costs and disbursements necessarily attending the trial of a cause of this character are burdensome enough to litigants, without being increased by constructive and unauthorized fees. But since there are no findings of fact in the record, as provided in section 557 of the Code, we are unable to determine whether the objections are well founded or not. The law makes it the duty of the trial court, on retaxation of costs, to make findings of fact and law upon each item objected to, and give judgment thereon, from which an appeal may be taken. This seems not to have been done in this case, and for this reason the cause must be remanded with directions to the court below to make such findings and retax the costs.

The decree of the court will therefore be affirmed as to the first cause of suit, reversed and complaint dismissed as to the second, plaintiff to recover his costs and disbursements in this court and in the court below, and the cause remanded with directions to retax the costs in the court below. MODIFIED.

Statement of the case.

[Decided June 29, 1893.]

24	261
26	198

PACKWOOD *v.* STATE.

[S. C. 83 Pac. Rep. 674.]

1. **AFFIDAVIT FOR CHANGE OF VENUE.**—An affidavit for a change of venue need not necessarily state in so many words that the application is not made for the purpose of delay, since that fact may appear from the facts set forth as clearly as from any positive statement to that effect.
2. **POWER OF JUSTICE'S COURTS TO GRANT CHANGES OF VENUE IN CASES OF MISDEMEANORS.**—A justice of the peace has authority to grant a change of venue in cases of misdemeanor. It is true that the Code of Criminal Procedure by which, under section 2131, Hill's Code, the practice in criminal matters before a justice is generally regulated, does not provide for a change of venue in misdemeanors, but section 2078, which does provide for such a change, applies to both civil and criminal cases, and modifies section 2131.

Union County: JAS. A. FEE, Judge.

This is a proceeding, by writ of review, prosecuted by Wm. H. Packwood, Jr., and others to reverse and annul the action of the justice's court for Cove Precinct, Union County, in refusing to grant a motion for a change of venue, and proceeding with the trial of a criminal charge against the plaintiffs for trespassing upon enclosed lands, in violation of section 1794 of Hill's Code. The motion was based upon the affidavits of each of the defendants in the criminal proceedings, and plaintiffs herein, setting forth, among other things, that James Hendershott, justice of the peace for Cove Precinct, had been and was then directly interested in the land upon which defendants were charged with having trespassed, and that he had been for a long time and still was the agent, adviser, and counsel of the private prosecutor regarding the land, and had assisted him in attempting to acquire title thereto, and had very recently been investigating the same at Portland and Salem, and was so prejudiced against the defendants therein that they could not expect to and would not receive a fair and impartial trial in said justice's court. The

Opinion of the court—BEAN, J.

motion for a change of venue was overruled by the justice's court, and a trial had, resulting in the conviction of the defendants in the criminal proceeding, and a judgment that they each pay a fine of fifteen dollars and costs. Upon a hearing in the circuit court, the action and proceedings of the justice's court were affirmed, and plaintiffs appeal. REVERSED.

J. L. Rand, for Appellant.

Chas. F. Hyde, district attorney, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

1. That the affidavits for a change of venue in the justice's court presented sufficient grounds for a change of the place of trial, is too clear for argument. It is an ancient maxim, and one founded on the most obvious principles of natural right and justice, that every litigant is entitled to a hearing and trial before a fair and impartial court or tribunal. This principle finds expression in our statute by the provisions for a change of venue when the court or judge is so prejudiced against the party making the motion that he cannot expect a fair and impartial trial before such court or judge: Sections 45, 274, and 1222, Hill's Code. These provisions of the statute should receive a broad and liberal, rather than a technical and strict, construction, and the courts ought not to be too astute in discovering some refined and subtle distinction to avoid their operation, for, as was said by Mr. Justice GRAVES, "The immediate rights of the litigants are not the only object of the rule, but sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observation": *Stockwell v. Township Board of White Lake*, 22 Mich. 349. Indeed, the sufficiency of the facts stated in the affidavits is not seriously questioned, but the contention for the respondents is (1) that the affidavits are defective in sub-

stance because they do not state that the motion was not made for the purpose of delay; and (2) the statute does not provide for or authorize a change of venue in a criminal action for a misdemeanor in a justice's court. The affidavits are clear to the effect that the justice before whom plaintiffs were arraigned for trial had prejudged the case, and that his interest and personal connection with the controversy about the title to the land, which was the only matter in dispute, rendered it improbable, if not impossible, for plaintiffs to obtain a fair and impartial trial before him, and hence was a sufficient ground for a change of venue. To hold that in such a case, where the motion is made in good faith, the affidavit is fatally defective because it does not also state that the motion is not made for the purpose of delay, would be sacrificing substance to form. An application for a change of venue must, indeed, be made in good faith and not for the purpose of delay, but that may appear as clearly from the facts set forth in the affidavit as from any positive statement to that effect, and, when it does so appear, the affidavit is, in our opinion, sufficient.

2. By section 2131 of Hill's Code it is provided that "A criminal action in a justice's court is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner provided in the Code of Criminal Procedure, except as in this act otherwise specially provided." As no provision is made by the Code of Criminal Procedure for a change of the place of trial in a misdemeanor (section 1222, Hill's Code), it is argued that a justice's court has no authority to grant such change. But the provision above referred to, concerning the procedure in criminal actions in a justice's court, is section 78 of the act to regulate the civil and criminal procedure in justices' courts, to which section 2078, Hill's Code, was added by the act of December 19, 1865. By this latter section it is provided that a justice may change the place of trial, on

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motion of either party, when it appears from the affidavit of such party that the justice of the peace is so prejudiced against him that he cannot expect a fair and impartial trial before said justice. This provision, from its language, would seem applicable to either a civil or criminal action, and is, we think, one of the exceptions referred to in section 2131, and was intended and designed to authorize a justice of the peace to change the place of trial in any action, civil or criminal, before him. Otherwise there is no provision of law for a change of the place of trial in criminal actions in a justice's court, as that court has jurisdiction only of certain misdemeanors; and although a justice may be wholly disqualified from hearing the cause by reason of the provisions of section 913 of the Code, or by being so prejudiced against the defendant as to prevent a fair and impartial trial, it must either proceed before him or be discontinued. Such a construction of the statute would often result in manifest injustice and wrong, and ought not to be adopted if it can be reasonably avoided without doing violence to the express language of the statute. It seems to us, from the section of the statute above cited, that the justice of the peace was authorized by law to grant a change of venue in the case now under consideration, and that the affidavits upon which the motion was based constituted sufficient grounds for such change, and that it ought to have been granted.

It follows that the judgment of the court below must be reversed and this cause remanded to the circuit court with directions to that court to reverse the action of the justice's court and remand the cause with directions to grant the motion for the change of venue. **REVERSED.**

Opinion of the court—LORD, C. J.

[Decided June 29, 1893.]

DUFFY v. MIX.

[S. C. 33 Pac. 307.]

24	205
28	146
24	205
37	157

MINES—JURISDICTION OF JUSTICE'S COURT—CODE, §§ 2175-2183.—The locator of a quartz mine under the laws of the United States (Rev. Stat. § 2319, *et seq.*) has simply a possessory, but not a legal, estate therein, and may therefore maintain in a justice's court, under sections 2175-2183, Hill's Code, an action for the recovery of such possession, since the title to real estate is not in question.

Union County: JAS. A. FEE, Judge.

This was an action originally brought by C. J. Duffy and M. J. Dray against W. A. Mix, L. B. Rinehart, and S. A. Mix, in a justice's court for the recovery of the possession of a quartz mining claim known as the "Mayflower," in which the plaintiffs recovered a judgment, from which the defendants appealed to the circuit court, where plaintiffs again recovered judgment, and from which defendants have appealed to this court. In the justice's court the defendants demurred to the complaint on the ground that the court did not have jurisdiction of the subject matter of the action, which was overruled. This demurrer was again urged in the circuit court on appeal, but it was again overruled, and constitutes the only error relied upon in this appeal, although there are some others assigned. **AFFIRMED.**

T. H. Crawford, for Appellants.

Robert Eakin, for Respondents.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

The contention for the defendants is that the party who discovers a mineral-bearing vein or lode in place upon the public lands, marks out and locates the same on the

Opinion of the court—LORD, C. J.

ground, posts his notice thereon and records it, as prescribed by the customs or laws, has not only the right of possession, but a freehold title thereto under a grant from the United States, which can only be defeated by his failure to comply with the conditions attached to such grant. Hence it is claimed that in the trial of an action for the recovery of the possession of a mining claim, where the issue tendered and raised by the pleadings is the right of possession, or the possessory title under the mining laws of the United States, where the right is questioned, either by failure to comply with the law in making the location, or failure to comply with the conditions attached to the grant as to annual assessment work, that the title to real estate is essentially the issue to be tried, of which a justice's court has no jurisdiction. Section 1 of article VII. of the constitution provides that justices of the peace may be invested with limited judicial powers. Section 908 of Hill's Code, after providing that a justice's court has jurisdiction, but not exclusive, of the actions enumerated therein, declares by section 909 that the jurisdiction conferred by the preceding section does not extend to "an action in which title to real property shall come into question." Section 2081 of Hill's Code provides that "If it appears on the trial of any cause or action before a justice of the peace, from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other party, the justice shall immediately make an entry thereof in his docket, and cease all further proceedings in the cause, and shall certify and return to the circuit court of the county a transcript of all entries," etc. These sections clearly indicate that it was the intent of the legislature to withhold from the justice's court jurisdiction to try any action where the title to real estate comes in question. Justice's courts, not being courts of record, their judgments are not safe and enduring evidence of title to realty, and, being often presided over by men untrained in the law,

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and by reason thereof incapable of determining the intricate and difficult questions which arise in relation to titles to land, they are not regarded as safe depositories for the exercise of such jurisdiction.

Sections 2175, 2183, Hill's Code, show that a justice's court has jurisdiction of an action to recover the possession of a mining claim, prescribe the facts that must be set out in the pleadings constituting the plaintiff's right of possession, the answer of the defendant, the substance of the judgment to be entered, the evidence that may be given, and provide for the right of appeal and the enforcement of the judgment. The action for which these sections provide is purely possessory, and does not contemplate the trial of questions which involve the legal title to realty. Its object is to furnish a speedy remedy for the recovery of a mining claim to one ousted from the actual possession, but in whom is the right of possession. It is not intended to take the place of an action of ejectment. The action of ejectment can only be used as a remedy to determine the right of possession where the plaintiff has a legal interest or title to the property the possession of which is sought to be recovered. Section 316, Hill's Code, provides that "Any person who has a legal estate in real property, and a right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law." It is said in *Chapman v. Dougherty*, 87 Mo. 617, that "in our statutory ejectment all the constituent elements of title are involved: possession, right of possession, and right of property": *Joy v. Stump*, 14 Or. 362. But a question as to actual possession is not one involving title, neither is the question as to the right of possession, independently of any claim of title. When the plaintiff is denied or deprived of the possession of his mining claim, it is the "facts constituting his right of possession" that furnish the basis of the justice's courts' jurisdiction, and the right to adjudge the recovery of its

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possession. The action is possessory, and the right of possession, not of property, is contested. The action decides nothing with respect to the right or title of property; it merely restores the plaintiff to that state or condition in which he was, or by law ought to have been, before dispossession. We think, therefore, there is no jurisdiction given to a justice's court in an action for the recovery of a mining claim to try questions of title to real property.

The question then recurs whether the location of a quartz mine under the laws of the United States confers on the locator, before entire compliance with their requirements, such legal rights or title to it as precludes the right of a justice's court to exercise jurisdiction in an action by him for the recovery of its possession. The answer to this question depends upon the nature of the interest which the locator has acquired in the claim. By section 2319, *et seq.*, revised statutes of the United States, all valuable mineral deposits in lands of the United States and in lands on which they are found, are declared to be open to exploration, occupation, and purchase. The mode of locating such lands as mining claims is fully provided for, and the locators are granted the exclusive right of possession and enjoyment of the surface included within the lines of their location. In *Gwillim v. Donnellan*, 115 U. S. 49, the court says that "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located." "The statutes of the United States," Mr. Justice BREWER said, in *Aspen Mining Co. v. Rucker*, 28 Fed. Rep. 220, "provide that upon the performance of certain conditions, the discoverer of a mine becomes entitled to a patent. If all these conditions have been performed, the full equitable title is vested in the discoverer, and all that the government retains is the naked

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legal title in trust for the equitable owner. If only partially performed, he has an absolute right of possession, and an inchoate title, which further performance will perfect and complete." This possessory right is declared by the statutes and decisions of some of the states to be real estate title, and as such passes to the heir, and is subject to seizure and sale. In this state we have no statute declaring such possessory rights, or right of possession to a mining claim, to be real estate title. The rights given under the United States statutes are possessory, and do not confer title, but entitle a party, who, having made and marked his discovery, and performed and kept up the work necessary to a valid and subsisting location, for the purpose of developing the mine, to the exclusive possession and enjoyment thereof against the whole world. Such is the case of the plaintiffs. They have located their mining claim, and are engaged in working, and doing those things essential to make it a valid and substantial location. Whether they intend to fully comply with the requirements of the law so as to entitle them to a legal title or patent we are unadvised, but their right to the present possession, while so engaged, is absolute and exclusive against all the world. As this right of possession entitles the plaintiffs to work the mine, take out its ore and appropriate it to their own use and profit, it is a valuable right and protected by the law. Such being the case, whoever wrongfully deprives them of its possession will be adjudged to restore it in an action for its recovery. As the right of the plaintiffs to the possession of the mine in question is not a legal estate or title to land, an action may be maintained in a justice's court for its recovery, if they have been wrongfully deprived of its possession. As the demurrer of the defendants admits the facts constituting the plaintiffs' right to the possession of the "Mayflower" mining claim, and that they wrongfully and clandestinely deprived plaintiffs of its possession, and still continue to withhold

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such possession from them, it results that the judgment for its recovery must be AFFIRMED.

[Decided June 29, 1893; modified October 25, 1893.]

DURKHEIMER v. HEILNER.

[S. C. 83 Pac. Rep. 401.]

DISSOLUTION OF PARTNERSHIP—ACCOUNTING—RECEIVER.—In a suit for the dissolution of partnership, and an accounting, the court should appoint a receiver to convert the property into cash, and should award each partner his share of the net assets, after payment of firm liabilities, less what he may have already received.

LEDGER ENTRIES AS EVIDENCE are inadmissible without supporting proof from the original entries, unless they are admitted without objection.

Baker County: MORTON D. CLIFFORD, Judge.

Defendants appeal. Modified.

T. H. Crawford, and *T. C. Hyde*, for Appellants.

Bailey & Balleray, *C. A. Johns*, and *Charles F. Hyde*, for Respondents.

MR. JUSTICE MOORE delivered the opinion of the court:

This is a suit brought by the plaintiff against the defendants to dissolve a partnership alleged to have existed between them, under the firm name of Heilner, Ottenheimer & Co., and for an accounting. The cause was referred to a referee to take the testimony, and the court upon the hearing rendered a decree against the defendants S. A. Heilner and S. Ottenheimer for the sum of thirteen thousand one hundred and ninety-two dollars and ninety-eight cents, and the costs and disbursements, from which they appeal. It appears from the evidence that on March 8, 1885, the plaintiff and defendants entered into a partnership at Baker City, Oregon, with a capital of seventy-three

thousand two hundred and thirty-two dollars and thirty-eight cents, of which plaintiff furnished twenty-five thousand five hundred and five dollars and fifty-nine cents, the defendant Heilner twenty-one thousand one hundred and thirty-two dollars and thirty-nine cents, and the defendant Ottenheimer twenty-six thousand five hundred and ninety-four dollars and forty cents; that on August 10, 1885, the stock of goods owned by the firm was sold to defendant Ottenheimer for twenty-two thousand five hundred dollars, for which he gave three promissory notes for seven thousand five hundred dollars each; that on August 10, 1885, the assets of said firm were as follows: Accounts, sixty-four thousand one hundred and thirty-seven dollars and eight cents; notes, fifty-six thousand five hundred and twenty-four dollars and ninety-five cents; real estate, five thousand eight hundred and fifty dollars; other personal property, one hundred and seventy-five dollars,—making a total of one hundred and twenty-six thousand six hundred and eighty-seven dollars and three cents, which embraces the notes above mentioned; that the liabilities of said firm on that day were as follows: To the Baker City creditors, eight thousand six hundred and eleven dollars and seventy-two cents; Portland creditors, twenty-three thousand and thirty dollars and forty-nine cents, and San Francisco creditors thirty-two thousand nine hundred and seventeen dollars,—making a total of sixty-four thousand five hundred and fifty-nine dollars and twenty-one cents; that when the liabilities were paid there would remain as available assets the sum of sixty-two thousand one hundred and twenty-seven dollars and eighty-two cents, and of this sum the court found that the real estate was valued at four thousand dollars,—thus leaving of money, notes, accounts, and personal property the sum of fifty-eight thousand one hundred and twenty-seven dollars and eighty-two cents; that each partner was entitled to one third of that amount, in addition to the real estate, or the sum of nineteen thou-

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sand three hundred and seventy-five dollars and ninety-four cents, and that the plaintiff had received six thousand two hundred and twenty-two dollars and ninety-six cents, leaving a balance of thirteen thousand one hundred and fifty-two dollars and ninety-eight cents due him for which he obtained a decree. This would have been correct if the defendants had converted into money the whole assets as above stated, but it appears that since May 10, 1885, they had collected of the accounts the sum of forty-two thousand six hundred and sixty-four dollars and ninety-three cents, and of the notes the sum of forty-four thousand two hundred and eighty-four dollars and ten cents, making a total of eighty-six thousand nine hundred and forty-nine dollars and three cents; that from this sum so collected they had paid the liabilities of sixty-four thousand five hundred and fifty-nine dollars and twenty-one cents, thus leaving a balance of twenty-two thousand three hundred and eighty-nine dollars and eighty-two cents, and that the plaintiff is entitled to one third of that amount, or seven thousand four hundred and sixty-three dollars and twenty-seven cents, and as he had received six thousand two hundred and twenty-two dollars and ninety-six cents he should have had a decree for one thousand four hundred and forty dollars and thirty-one cents instead of the one rendered for thirteen thousand one hundred and fifty-two dollars and ninety-eight cents. The total assets of the firm August 10, 1885, not including the value of the real estate, was one hundred and twenty thousand eight hundred and thirty-seven dollars and three cents; that since the total collections have been eighty-six thousand nine hundred and forty-nine dollars and three cents, that there remains of the notes, accounts, and personal property uncollected and undisposed of, the sum of thirty-three thousand eight hundred and eighty-eight dollars, and that the plaintiff is entitled to one third of this amount when converted into money.

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The decree of the court below will be reversed so far as it relates to the amount found due the plaintiff, and one here entered dissolving the copartnership, and rendering a decree in favor of the plaintiff and against the defendants for one thousand four hundred and forty dollars and thirty-one cents, and for his costs and disbursements in this court and in the court below. The cause will be remanded to the court below with directions to appoint a receiver to sell the said notes, accounts, and personal property, and, after payment of the expenses thereon, upon the report of such receiver, a decree will then be entered awarding to plaintiff one third of the net proceeds of such notes, accounts, and personal property.

On REHEARING.

MR. JUSTICE MOORE delivered the opinion of the court:

On a rehearing of this cause, it is claimed that inasmuch as one of the seven thousand five hundred dollar notes of the defendant Ottenheimer was found with other notes of the firm in the bank it must be classed with the unpaid notes due the firm and therefore a part of its assets. The evidence of the plaintiff shows that there has been collected on the notes of the firm forty-four thousand two hundred and eighty-four dollars and ten cents, and he gives a detailed statement of each note collected and the amount thereof, and shows that the three notes of S. Ottenheimer for seven thousand five hundred dollars each had been paid, and that they formed a part of the amount so collected, thus showing that while the said note is in the bank, it has been paid off and now forms no part of the assets of the firm.

It was made to appear at the former hearing that plaintiff had received only six thousand two hundred and twenty-two dollars and ninety-six cents. He testifies that he kept the books and made the entries to February,

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1887. By his own entries, he is charged in the ledger with nine thousand one hundred and seventy-two dollars and ninety-six cents and credited with one thousand nine hundred and fifty dollars, and when he struck a balance between these amounts he found it to be six thousand two hundred and twenty-two dollars and ninety-six cents, thereby making a mistake in his favor of one thousand dollars. There are several entries in the ledger after February, 1887, but as the defendants made no proof from the original entries in support thereof, they will not be considered, except in so far as they are admitted by the plaintiff. He is charged in the ledger with having received the proceeds of several notes, and admits that he received the money on the notes of Speelman, Hudspeath, and Weatherby. These notes were for the following amounts: J. Speelman, seven hundred and eight dollars and seventy cents; G. Hudspeath, one hundred and fifty dollars and twelve cents; A. J. Weatherby, eight hundred and thirty-seven dollars and seventy cents,—making a total of one thousand six hundred and ninety-six dollars and fifty-two cents, and in all of eight thousand nine hundred and nineteen dollars and forty-eight cents. He was entitled, after the payment of the debts, to receive one third of the money collected at the commencement of the suit, amounting to seven thousand four hundred and sixty-three dollars and twenty-seven cents, and since he has received eight thousand nine hundred and nineteen dollars and forty-eight cents, this is one thousand four hundred and fifty-six dollars and twenty-one cents more than he was entitled to on account of the collections. It appears that he holds the note of Dan Shaw for three hundred and sixteen dollars and seven cents, which is a part of the thirty-three thousand eight hundred and eighty-eight dollars found to be the total assets of the firm.

It is claimed that the defendants have received more than their share of the amount collected. After the pay-

ment of the debts of the firm there remained a surplus of twenty-two thousand three hundred and eighty-nine dollars and eighty-two cents at the commencement of this suit, of which plaintiff received one thousand four hundred and fifty-six dollars and ninety-one cents more than his share, which must be considered in apportioning his share of the uncollected assets. If the personal property as appraised, and the notes and accounts at their face value, amounting to thirty-three thousand eight hundred and eighty-eight dollars, are in the possession of defendants, they cannot be made chargeable with more than their rightful shares of said surplus, because any amount overdrawn by them must necessarily come from collections on said notes, etc. If, however, it is found that all said notes, accounts, and personal property are not in their possession, and that any collections have been made thereon, or that said personal property has been sold or appropriated, then and in that case they must account to the plaintiff for the deficiency in such assets. It was conceded that plaintiff was entitled to a decree for one third of the real estate of the firm, as described in the pleadings. The decree awarding plaintiff one thousand four hundred and forty dollars and thirty-one cents heretofore rendered will be set aside, and the cause remanded with directions to appoint a receiver to sell the said notes, accounts, and personal property, and after the payment of the expenses thereon, upon the report of the receiver, a decree will then be entered awarding to plaintiff one third of the net proceeds thereof less one thousand four hundred and fifty-six dollars and twenty-one cents.

Points decided.

[Argued April 6, 1893; decided June 19, 1893; affirmed January 8, 1894.]

AHERN v. OREGON TELEPHONE CO.

[S. C. 33 Pac. Rep. 403.]

PLEADING—VARIANCE—CODE, § 98.—In an action against a telephone company for damages for carelessly permitting a wire heavily charged with electricity to hang dangerously low in a public street, it is not a fatal variance to allege that while passing along the street plaintiff came in contact with the wire, which he was unable to see owing to the darkness, and that upon attempting to remove it from his way, he was shocked and burned by electricity, and upon the trial to show that while passing along the street plaintiff slipped, and in groping about for his packages which had fallen, touched the wire and was so injured; this is a variation of the circumstances and particulars, but the real cause of complaint, viz., the negligence of the defendant, appears as much from one set of circumstances as from the other. This shows an immaterial variance, but not a failure of proof.¹

NEGLIGENCE—ELECTRIC WIRE.—It is negligence to allow a wire which, from its environment, is liable to become charged with electricity, to hang in or over a street or sidewalk at such a height as to obstruct and endanger ordinary travel.

IDEM.—A telephone company which, instead of removing its wire on taking it out of a residence, leaves it hanging upon an electric-light company's pole, is bound to look after it, and is liable for an injury to a traveler who comes in contact with it after it has been removed by employees of the electric-light company and hung upon a telephone pole, where it is accidentally touched by a traveler on a sidewalk while it was charged by contact with an electric-light wire or a street railway company's wire.

NEGLIGENCE—PROXIMATE CAUSE.²—Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk is a proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric-light company or a street-railway company, at least, where it does not appear that these were out of their proper position.

¹Section 98 of Hill's Code provides that "when the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof."

²NOTE.—An exhaustive discussion of proximate and remote cause in cases involving wrongful acts will be found with the case of *Gilson v. Delaware & Hudson Canal Co.* 36 Am. St. Rep. 807.—REPORTER.

Multnomah County: E. D. SHATTUCK, Judge.

Argument of counsel.

Action by Eugene Ahern against the Oregon Telephone & Telegraph Company to recover damages for personal injuries received by coming in contact with a telephone wire that had become heavily charged with electricity and was hanging down from a pole on which it had been coiled and hung. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Carey (*R. & E. B. Williams* on the brief), for Appellant.

Negligence in this case must be proved as a fact, and not presumed from the circumstance that plaintiff was injured: *Walsh v. Oregon Ry. & Nav. Co.* 10 Or. 250; *Coughtry v. Willamette Street Ry. Co.* 21 Or. 245; 1 Shearm. & Redf. Neg. § 60; *Parrott v. Wells*, 82 U. S. 15 Wall. 537; 21 L. Ed. 211; *Schultz v. Pacific Railroad*, 36 Mo. 31; *Baker v. Fehr*, 97 Pa. 70; *Gramlich v. Wurst*, 86 Pa. 74 (27 Am. Rep. 684); *Bachelder v. Heagen*, 18 Me. 32; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236 (38 Am. Rep. 566).

When an injury may have come of either one of two causes, either of which may have been the sole proximate cause, it devolves on the plaintiff to prove by a preponderance of evidence that the cause for which the defendant was liable was culpable, and the proximate cause: 16 Am. and Eng. Enc. Law, p. 445; *Patterson*, Railway Accident Law, 435; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *West Mahanoy Twp. v. Watson*, 112 Pa. 578; *Marble v. Worcester*, 4 Gray, 397. In this case the accident must be ascribed to the circumstance that the wire had become charged with electricity, and not alone to the position of the wire at the sidewalk.

Where a plaintiff avers a particular state of facts, he is entitled to a verdict only in virtue of giving evidence tending to prove the state of facts so averred: *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Buffington v. Atlantic & P. R. Co.* 64 Mo. 246; *Stout v. Coffin*, 28 Cal. 65; *Neu-*

Argument of counsel.

decker v. Kohlberg, 81 N. Y. 296; *Boardman v. Griffin*, 52 Ind. 101; *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289; *Knahla v. Oregon Short Line R. Co.* 21 Or. 136.

The duty imposed does not require the taking of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means, which, it may appear after the accident, would have avoided it; it was only required to use such reasonable precaution to prevent the accident as would have been adopted by prudent persons prior to the accident. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367; *Pollock*, Torts, 36; *Volkmar v. Manhattan R. Co.* 26 Jones & S. 125; *Daniel's v. Potter*, 4 Car. & P. 262; *Holden v. Liverpool New Gas & C. Co.* 3 C. B. 1.

No man can be charged with neglect if he used due care according to the circumstances, although there could have been even more elaborate and effective precautions conceived of by some one else: 16 Am. & Eng. Enc. Law, p. 398, title, Negligence; Ordinary Care.

If a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is not responsible even though the injury would not have occurred but for his negligence: *Cooley*, Torts, 73; *Washington v. Baltimore & O. R. R. Co.* 17 W. Va. 190; *West Mahanoy Twp. v. Watson*, 116 Pa. 349.

An intervening efficient cause, sufficient to break the causal connection between the original wrong complained of and the injury, may be either culpable or not culpable, accidental or intentional, animate or inanimate. The test is, was the new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the claim

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of causation; although it may have remotely contributed to the injury as an occasion or condition thereof? 16 Am. & Eng. Enc. Law, 445; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55 (52 Am. Rep. 790); *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U.S. (7 Wall. 44, 19 L. Ed. 65); *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293 (27 Am. Rep. 653); *Pennsylvania Co. v. Whitlock*, 99 Ind. 16 (50 Am. Rep. 71); *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475 (24 L. Ed. 259); *Merchants' Wharfboat Asso. v. Wood*, 64 Miss. 662 (60 Am. Rep. 76); *Tutein v. Hurley*, 98 Mass. 211 (93 Am. Dec. 154); 2 Thompson, Negligence, 1084, *et seq.*; 33 Cent. L. J. note, 450.

The proximate cause of the injury must be alleged in the complaint with particularity, and strictly proved on the trial: *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289; *Knahtla v. Oregon Short Line & U. N. R. Co.* 21 Or. 136.

Since the facts are not disputed, the question whether the acts of defendant were the remote or the proximate cause of the injury, is a question for the court, and not for the jury, and should be determined by this appeal: *West Mahanoy Twp. v. Watson*, 116 Pa. 344; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293 (27 Am. Rep. 653); *Henry v. St. Louis K. & N. R. Co.* 76 Mo. 288 (43 Am. Rep. 762); *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55 (52 Am. Rep. 790); *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404; *Baker v. Fehr*, 97 Pa. 70; *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289; *Langford v. Jones*, 18 Or. 307; *Gibson v. Oregon Short Line & U. N. R. Co.* 23 Or. 493.

ON PETITION FOR REHEARING.

Whatever the rule may be in the cases of bailments, in other cases of negligence the distinction between slight, ordinary, and great care should be repudiated, and the true test should be whether the defendant exercised such care as ordinarily prudent men, in view of the probabilities of danger, would have exercised: 16 Am. & Eng. Enc.

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Law, 398, 402, 426; Wharton, Negligence, §§ 44, 65, 66; Cooley, Torts, *631, 632; Deering, Negligence, § 11; Bishop, Non-Cont. L. §§ 439, 442; 2 Redfield, Railways, 229, note 5.

Mankind might be capable of taking precautions that would be extraordinary, unnecessary, and impractical, but ordinary caution in the management and control of electricity does not reach so far. Even if the utmost caution is to be required, it is the caution that is practical and not that which is simply conceivable: Hutchinson, Carriers, § 502; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 296, 23 L. Ed. 899; *Tuller v. Talbot*, 23 Ill. 357 (76 Am. Dec. 695); 2 Redfield, Railways, 239; 2 Wood, Railway Law, 1058, note 1.

The defendant was not engaged in managing or controlling a dangerous current of electricity, and the rule of extreme caution does not measure its responsibility: *Kelly v. Manhattan R. Co.* 3 L. R. A. 74 (112 N. Y. 450); *Palmer v. Pennsylvania Co.* 2 L. R. A. 252 (111 N. Y. 488); *Morris v. New York Cent. & H. R. R. Co.* 106 N. Y. 678; *Lafflin v. Buffalo & S. W. R. Co.* 106 N. Y. 136 (26 Am. Dec. 629); *Moreland v. Boston & P. R. Corp.* 141 Mass. 31.

James Gleason, and Alfred F. Sears (Henry E. McGinn, and Nathan D. Simon on the brief), for Respondent.

The motion for a nonsuit was very properly denied: Code, §§ 246, 247; *Grant v. Baker*, 12 Or. 329; *Anderson v. North Pacific Lumber Co.* 21 Or. 281. Where a telegraph wire is left swinging across a public highway, at such a height as to obstruct and endanger ordinary travel, such fact unexplained and unaccounted for, raises a presumption of negligence: *Thomas v. Western U. Telcg. Co.* 100 Mass. 156; *Dickey v. Maine Teleg. Co.* 46 Me. 483; *Thompson, Negligence*, § 24, 359; *Western U. Teleg. Co. v. Eyser*, 2 Colo. 141; *Stephens & C. Transp. Co. v. Western U. Teleg. Co.* 8 Ben. 502; *Gray v. Boston Gas Light Co.* 114 Mass. 149 (19 Am. Dec. 324).

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A telephone company which for several weeks permits its wire to remain suspended across a public highway a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm, and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire: *Southwestern Tele. Co. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, (2 U. S. App. 205, 50 Fed. Rep. 810); *United Electric R. Co. v. Shelton*, 89 Tenn. 423.

It is the duty of a telephone company using a public highway for its poles and wires to so construct and maintain its line as not to incommode the public use of the highway for the purpose of travel and transportation, whether by ordinary vehicles, or by street railways: *Central Pennsylvania Teleph. & S. Co. v. Wilkes-Barre & W. S. R. Co.* 11 Pa. Co. Ct. Rep. 417; *Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Asso.* 12 L. R. A. 534, 48 Ohio St. 390.

If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages from either: 2 Thompson, Negligence, 1088, *et seq.*; 15 Am. & Eng. Enc. Law, 440.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in permitting its wire to come in contact with an electric wire, whereby it became heavily charged with electricity, and in allowing such wire to hang down so near the ground at the corner of K and Twenty-first Streets as to endanger the life and limb of those traveling upon such streets. The errors assigned relate to the refusal of the trial court to grant a nonsuit, and to certain instructions given and refused. Upon the first point the conten-

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tion is that the evidence does not prove the cause of action alleged, although it may be sufficient to constitute a ground of action, and consequently that the variance is fatal to the plaintiff's recovery. It is no doubt true that the plaintiff must state the facts which constitute his cause of action, and that he cannot state one and prove another. The Code, with all its comprehensive liberality, will not admit, as SHERWOOD, J., said, "a plaintiff to sue for a horse and recover a cow": *Waldhier v. Hamilton Railroad*, 71 Mo. 518. Such variance is fatal, for the reason that the cause of action, is unproved in its entire scope. The inquiry, then, is whether the testimony for the plaintiff establishes a cause of action different from the one alleged. That there is some variation between the evidence and the complaint, may be conceded, but it consists only in matter of detail, or as to how the injury occurred; there is no absolute departure in the proof from the original theory of the case. The point to which the variance relates is this: The allegation, in substance, is that the plaintiff was walking along the sidewalk, and came in contact with the wire, which, owing to the darkness, he was unable to see; that he attempted to remove the same from his pathway, and in doing so caught hold of the wire, and the electricity with which it was impregnated passed into his body, etc.; whereas his testimony shows that he was walking along the sidewalk, and, owing to the darkness and rain and the slippery pavement, he slipped and fell on his elbow, causing his hat to fall off and some packages to drop out of his hands, and that in groping for his hat and packages, his hand came in contact with the wire, which, being impregnated with electricity, "grabbed" it, and as he could not let go, he put out his other hand to remove the same, when the wire "grabbed" that hand, etc. Plainly the variation here is only of detail, or as to the circumstances under which the plaintiff came in contact with the wire, and received the injury. The elements of negligence

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alleged, namely, in permitting its wire to come in contact with the electric wire, and to hang so near the ground as to endanger life or limb, are present in either aspect of the case, or as much under the testimony as the allegation. Such variance does not present a case where the cause of action is unproved in its entire scope and meaning, within the construction of section 98, Hill's Code. Hence there is not a failure of proof, and without such failure the variance is not fatal, or such as would entitle the defendant to a judgment of nonsuit.

The principal ground of complaint remains, however, to be considered. This is, was the negligence of the defendant the proximate cause of the injury? There are some other minor questions suggested by way of criticism upon the charge of the court, but the remoteness of defendant's acts, and the intervention of other agencies directly contributing to plaintiff's injury are relied upon as the chief defense. It was the failure of the court, as indicated by the instructions given and refused, to properly apply the law in this regard, that constitutes the main grievance of the defendant. To comprehend the force of this objection, we must first know and understand the facts.

The plaintiff is a laboring man, and was employed by the gas company to shovel coal into its furnace. On the day of the accident he quit work after five o'clock P. M. and started for his home, but on his way went to market, made some purchases, and went out G Street to Twenty-first, and when passing down that street, near the corner of K, he slipped on the sidewalk, and fell on his elbow, his hat falling off, and the packages which he carried flying out of his hands. After he got up he groped for his packages and hat, when his hand rubbed against a wire, one end of which was hanging down over the sidewalk at the intersection of the street. His testimony on this point is: "My hand rubbed against this wire, grasp-

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ing hold of me fearfully. I then took the notion to put up this hand to hit this one away from there; it grabbed that one and held on to it fearfully. I could not let go; it was too strong. I don't know what part of my hand caught hold of it; my fingers rubbed it first. It tore me fearfully, like machinery with about two hundred pounds of steam. I was screaming awfully, and finally I saw people around the sidewalk, and this hand after awhile dropped from the wire; that must have been the time my toes got burned. It whirled me up in all sorts of shapes. I don't know how I was. When this hand dropped I hung on with it until I was released. After this hand dropped I had no more memory at all; I lost my senses. I don't know what happened after that." Several persons hearing his screams for help, two men ran from J Street to his assistance, and one of them slashed at the wire with his knife and received a severe shock, but did not sever it; after some hesitation he slashed it again and succeeded in cutting the wire. The defendant was assisted to his home and put to bed, when it was found that three toes were badly burned. Afterwards he was taken to the hospital and one toe was amputated and the others were trimmed off. It was after six o'clock and quite dark when the accident occurred, and the sidewalk was slippery from recent rain. The defendant could not see the wire, nor did he know that it was hanging down over the street, nor that it was charged with electricity. The wires of the telephone company were strung on K Street running east and west, and the wires of the electric-light company and the electric street-railway company were strung along Twenty-first Street running north and south, so that the wires of the defendant were at right angles to the wires of the two electric companies. The evidence further shows that the defendant had an arrangement with the electric-light company by which either might use the poles of the other upon which to string a wire when it had no poles at the

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place, and only a short distance of wire was to be used; that the defendant used the poles of the electric-light company, when wiring the residence of a Mr. Bates at the corner of H and Twenty-first Streets, but that some three months before the accident the wire was disconnected from the telephone at his residence, and wrapped around the electric pole and made fast by tying it on to a bracket, and winding around the pole and around itself; that such wire had not been used by defendant after it was so disconnected, nor had the company made any inspection of it from that time until the accident; that during this interim the electric company changed its poles and wires along Twenty-first Street, and in doing so took down the pole belonging to it upon which the telephone wire was fastened as aforesaid, coiled up the wire, and hung it on a pole belonging to the defendant near K and Twenty-first Streets where the accident happened, but that the defendant had no knowledge that the electric company had taken down its poles or taken down its wire and hung it on the pole as aforesaid. Richard Gerdes testified that he was in the employ of the electric-light company, and that on the night of the accident he received a message by telephone that a man had been hurt by an electric-light wire; that he went at once to the place where the accident occurred, and found the wire hanging on the pole; that he cut it above the coil; that it was heavily charged with electricity by contact with a wire belonging either to the electric street-railway or the electric-light company; that it must have been the wire of one or the other that charged it with electricity, as there was no other heavily charged wire in that vicinity. The evidence further shows that the day before the accident the wire was hanging in the form of a coil on a stick at the side of the telephone pole, and that the bottom of it was two or three feet from the ground; that it was heavily charged with electricity, and that one witness who touched it with a wire was thrown to the ground from the shock.

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Among other things, the court, in substance, instructed the jury that the question here submitted is "whether it was negligence or not to leave a wire along a public thoroughfare, where it might be found in the way of pedestrians, or where it might be liable to be handled or interfered with by boys or by irresponsible persons." That it was for them to determine from the evidence "whether or not there was a proper inspection made of these wires so as to know what their condition was, and to ascertain whether anybody had been interfering with them, making them more dangerous than they otherwise would be." That "the fact that this company used the poles of another company, and the fact that other electric companies had wires upon the same street, does not detract at all from the strict requirements which should be made of the defendant company. Unless it had loaned its wires to the electric company, or the electric railway company, and placed them under the control of that company, it could not be absolved from the duty of looking after them and ascertaining and knowing what their condition was, and of anticipating and foreseeing what might happen in connection with them, and that unless you should find from the evidence that this defendant had turned over the use and control of its wires to these other companies on whose pole this wire was suspended, you have no right to say that those companies were liable and not this company, if this company was guilty of any negligence. Unless this company was negligent, there could be no recovery on the part of the plaintiff. If you find that it was not guilty of any negligence, then your verdict should be for the defendant." The counsel for the defendant requested the court to instruct the jury as follows: "If the jury finds that the defendant was not negligent in leaving its wire attached to the pole near Mr. Bates' house, as it did leave it, and that the wire was not dangerous as left by it, and could not, and did not, become dangerous except by

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the act or neglect of some other person or company, the defendant is not liable"; but the court refused to charge as requested, but gave it with the following modification: "I give you that in connection with the general instruction which I gave you that the defendant must have parted with the control of its wires in order to be exonerated by the reason of the negligent act of some other person." The defendant also requested the court to charge that "It is claimed by the defendant that it placed its wires in a safe and secure position, and that it [they] did not become dangerous except by the acts and omissions of others, without its knowledge or consent. If you find this is true, the defendant is not liable, unless the intervening acts or omissions of such other persons should have been contemplated and guarded against by the defendant as consequences likely to follow and which might have been reasonably anticipated." And, again: "If it was not negligent in leaving the wire as it did, it is not liable, unless it could have reasonably foreseen that some one would take down the wire and place it where it injured the plaintiff, and that it might come in contact with some other electric wire that was charged with a current of electricity that would make it dangerous." And, again: "Even if the defendant had left its wire coiled up or hanging over the sidewalk so that pedestrians might come in contact with it, it would not be liable for damages to the plaintiff for injury sustained by an electric shock from the wire unless the fact that the wire left there was the immediate or proximate cause of the injury, the wire not by itself being dangerously charged with electricity, and became so charged only by intermediate circumstances, namely, that of interfering with or crossing some heavily charged wire," etc. The court refused to so instruct the jury, and to its rulings thereon the defendant duly excepted.

It appears from the instructions that the theory of the law as applied to the facts by the trial court was that it

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is negligence to allow a wire, which, from its environment, is liable to become charged with electricity, to hang over the street at such a height as to obstruct and endanger ordinary travel; that it was the duty of the defendant, owing to the location of its wire, and the use of the poles of the electric-light company, to look after it and see that it was in proper condition, and that when the wire was disconnected from the Bates residence, if, instead of taking down the wire, the company chose to hang it upon the electric pole, the duty still devolved upon it to take care of such wire, and that this was a continuing duty from which it would not be absolved unless it had parted from the control of its wire to the electric companies. This requirement imposed upon the defendant the obligation of looking after and ascertaining the condition of its wire, and of anticipating or foreseeing results which were likely to happen by reason of its connection or location as to the electric wires, so as to avoid liability to danger arising therefrom. In this view of the law, the taking up of the pole by the electric-light company, and hanging the defendant's wire upon its pole at the intersection of K and Twenty-first Streets would not authorize the jury to find that the electric companies were liable, and not the defendant, if it was negligent in not removing its wire when it ceased to use it at the Bates residence. It is earnestly insisted by counsel that this view of the law is a wrong conception of the defendant's duty, for the reason that it makes the company liable for the wrongful acts of third persons in taking down the wire and hanging it on the pole where it became charged with electricity, which, he claims, are the responsible causes of the injury. This is based on the assumption that there intervened between the negligence of the defendant, if any there was, and the injury to the plaintiff, an independent adequate cause of the injury, namely, the wrongful acts of the electric company, which was the proximate cause of the injury. What is

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the proximate cause of the injury is ordinarily a question for the jury. It is only when the facts are undisputed that it becomes a question for the court. Wherever, therefore, there is any doubt, the question of proximate cause should be submitted to a jury to be decided as a matter of fact according to the circumstances of the case. To warrant a jury in finding that negligence is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Railway Co. v. Kellogg*, 94 U. S. 475. The question, therefore, whether the stretching of the defendant's wire on the electric poles instead of its own poles, and whether the omission of the defendant to remove the same when it ceased to use it at the Bates residence, was negligence, and, if it was, whether the intervening acts of the electric company and its consequences were such as could have been reasonably anticipated and guarded against by the defendant, was for the jury to determine in the light of the facts and circumstances.

The record discloses that the electric-light company gave the defendant permission to use its poles upon which to string its wire when the defendant needed them to connect its wire to a residence where it had no poles. When the defendant disconnected its wire from the telephone at the Bates residence, it had no longer any need to use the electric poles, and the permission or license given to use them ceased, or was at an end, and necessarily the defendant ought to have removed its wire from the electric poles; and if it did not do so, but coiled and hung it on one of them, where it had no right to be, the defendant was bound to look after it, and to expect, if it failed to do so, that the electric company would remove it when such wire incommoded that company, or its business required the removal of its poles as did happen. The jury found that the

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stretching of the wire upon the electric poles was dangerous, and that the omission of the defendant to remove it, when it disconnected the same from the Bates residence, and ceased to use it, was negligence, and that the intervening acts of the electric company and its consequences could have been foreseen as likely to happen, or possibly to follow, from leaving the wire coiled and hung upon the electric pole near the Bates residence, and necessarily that the defendant was responsible for its wire being coiled and hung upon its own pole at the intersection of K and Twenty-first Streets. This responsibility is based on the principle that if the defendant, instead of removing its wire, chose to hang it upon the electric pole, where it had no right to be, it was bound to look after it, and that, if the defendant had done so, it would have discovered the removal of the same, and its condition, so that the injury might have been avoided, and consequently that the company must be taken to have foreseen, as likely to happen, or possibly to follow, the consequences which resulted from its omission to remove the wire when it was disconnected from the telephone at the Bates residence. This is in accordance with the rule that a person guilty of negligence or an omission of duty "should be held responsible for all the consequences which a prudent and experienced man fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind": *Sherman & Redfield, Negligence*, § 29.

But this phase of the case is met with the argument that the telephone wire itself is not dangerous, and that the main or efficient cause of the injury was the electric current from the wires of the electric companies, with the production of which the defendant had nothing to do. In other words, that if the defendant was negligent, it was

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the dangerous force of electricity which intervened, and with the production of which the plaintiff had nothing to do, that communicated the injury to plaintiff, and, therefore, it was the proximate cause of the injury. It is no doubt true that where there is negligence and injury following it, and there is also an intermediate cause disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury: *Railway Co. v. Kellogg*, 94 U. S. 475. If the intervening cause and its probable consequence be such as could reasonably have been anticipated by the original wrong-doer, the casual connection between the wrongful act and the injury is not broken, and the defendant is liable for the injury. In *Sewing Machine Co. v. Richter*, 2 Ind. Ap. 334 (28 N. E. 446), it is said: "Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the original wrong-doer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be an efficient cause of the injury." The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of plaintiff's injury, to relieve the original wrong-doer from liability. "One of the most valuable of the criteria furnished us by the authorities," Mr. Justice MILLER said, "is to ascertain whether any new cause has intervened between the fact accomplished and the alleged

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cause. If a new force or power has intervened, of itself sufficient as the cause of the misfortune, the other must be considered as too remote": *Insurance Co. v. Tweed*, 7 Wall. 52. There is no claim that the wires of the companies transmitting electric power were not in their proper position, or that the companies were negligent in the use of their wires. We must take it, upon the facts as disclosed by this record, that their wires were where they had a right to be, and were not an obstruction endangering the life or limb of any one traveling along the street. It was the telephone wire, suspended on a pole, as shown by the evidence, that furnished the means by which the currents of electricity passing over the electric companies' wires were diverted and conducted so close to the ground as to render passage along the public thoroughfare exceedingly dangerous. As a consequence, it was the defendant's wire so hanging upon the pole that furnished the means by which the electric current was communicated to and injured the plaintiff. It is true that the electric current was a new power which intervened, and with the production of which the defendant had nothing to do, but it was harmless, or could not have been communicated to the plaintiff, but for the suspended wire of the defendant. As an intermediate cause it was connected with the primary fault and not self-operating, and therefore is not sufficient itself to stand as the cause of plaintiff's injury. The language of Mr. Justice BRUCE clearly illustrates this point: "To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force or power which intervened, with the production of which the telephone company had nothing to do, but upon this point in

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Insurance Co. v. Tweed, 7 Wall. 52, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account": *Southwestern T. & T. Co. v. Robinson*, 50 Fed. Rep. 813 (16 L. R. A. 545). It thus appears that the defendant's negligence was the primary and proximate cause of the injury. In view of this result, the other errors assigned are of little importance, and not such as would authorize the reversal of the case. It results that the judgment must be **AFFIRMED**.

ON REHEARING.

[S. C. 35 Pac. 542.]

Mr. CHIEF JUSTICE LORD delivered the opinion of the court:

The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been similarly suspended as to the street. It was this condition of affairs that led the court in its charge to refer to electricity generally as a "subtle and dangerous agency" which required the "utmost caution to control." As the telephone wire was liable to become charged with such dangerous agent, and thus to become dangerous to the travelling public, the duty of inspecting and ascertaining the condition of the wires, and whether there was any interference making them more dangerous than they otherwise would be, was necessarily involved. In view of these circumstances, the degree of care imposed was commensurate with the danger. "Due care is a degree of care corresponding to the danger involved": *Cooley, Torta*.

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It is not the same in all cases. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. Hence a wire, liable to be charged with an agency so dangerous and difficult to manage, while so located, needed to be looked after with such a degree of care and vigilance as would guard the public against liability to accident from it. The court then said: "The question is here submitted to you whether it was negligence or not to leave a wire along a public thoroughfare where it might be found in the way of pedestrians, or where it might be liable to be handled and interfered with by boys or by irresponsible persons." It further added: "Negligence, in cases of this kind, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. Applying those definitions to this case, the inquiry to be solved by you is, what did this defendant do that a cautious and prudent man would not have done in connection with the wire which has been described to you in the testimony, and which is mentioned in the pleadings?"

These instructions, taken in connection with the instructions referred to in the main opinion, we think fairly present the law governing the case. **AFFIRMED.**

Points decided.

[Decided June 29, 1893.]

STATE v. FLETCHER.

[S. C. 83 Pac. Rep. 575.]

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135	400
24	296
443	451

24	296
148	403

1. DYING DECLARATIONS—EVIDENCE.—To render dying declarations admissible in evidence they must appear to have been made under a sense of impending death and when the deceased had no hope of recovery; but such a belief may be inferred from circumstances, and need not have been expressly stated by the deceased. Within this rule statements made by one in a semi-comatose but conscious condition, suffering from a mortal gunshot wound from which he never rallied, and which speedily proved fatal, who has declared at intervals that he cannot live, and has previously said that he could not, because he was "hurt too bad," are admissible in evidence as dying declarations.
2. IMPEACHMENT—EVIDENCE—HARMLESS ERROR.—The exclusion of evidence tending to impeach a witness by showing inconsistent statements at other times, is harmless, where the witness himself admits having made such statements.
3. EVIDENCE OF EXPERIMENTS.—The result of experiments with a pistol and some cartridges found on a defendant made for the purpose of showing that a ball from such pistol would penetrate further into the woodwork of the room where deceased was shot than would balls fired from the pistol with which the killing is claimed to have been done, cannot be admitted in evidence unless it is shown that the conditions of position, distance, etc., were the same in both cases. *State v. Justus*, 11 Or. 179, approved and followed.*
4. EVIDENCE—STATEMENTS OF OTHER PERSONS—HEARSAY.—While it is admissible to show that another person committed the crime with which the defendant is charged, it must be by evidence directly connecting such person with the occurrence itself; but remote acts, disconnected and outside of the crime itself, confessions of others, and the like, are purely hearsay, and are inadmissible. Under this rule evidence is inadmissible on a trial for murder, that another person than defendant had threatened to kill the deceased, and that on the morning after the killing he said that he had killed him, that at the time he had on clothing corresponding to that worn by the murderer as described by a witness, and was seen coming from that direction four or five hours after the crime was committed.

Umatilla County: JAS. A. FEE, Judge.

Defendant appeals. Affirmed.

Leasure & Stillman, for Appellant.

*NOTE.—See, also, the case of *Leonard v. Southern Pacific Co.* 21 Or. 556 (15 L. R. A. with note; 28 Pac. Rep. 887).—REPORTER.

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Geo. E. Chamberlain, attorney-general, and Chas. F. Hyde, district attorney, for the State.

MR. JUSTICE BEAN delivered the opinion of the court:

The defendant, Frank Fletcher, appeals from a judgment of conviction of murder in the second degree in killing one Charles Petre, and assigns error in the admission and rejection of evidence by the trial court.

1. A question is made that the *ante mortem* declarations of the deceased were improperly admitted, because, it is claimed, the evidence does not show that they were made under a sense of impending death. The deceased was shot through the head about eleven o'clock on the evening of the ninth of November, 1892, while in bed, from the effects of which he died about three o'clock on the second day thereafter. It appears from the testimony of Frank Olinger, a boy about eleven years old, who was the only eye-witness to the homicide, that soon after the shooting the deceased got out of bed and tried to build a fire. Then he attempted to wash the blood from his person and close the door, but went back to bed, saying he "was shot through the head, and did not think he would live because he was hurt too bad." When visited by the physicians on the afternoon of the following day, he was found in a semi-comatose but conscious condition, capable, when aroused or spoken to, of answering intelligently such questions as were propounded to him. The witness Martin testifies that he called at the residence of the deceased about four o'clock on the day following the shooting, just as the physicians were leaving, and remained about two hours. At intervals during the time he was there the deceased used the expression, "My God, I can't live!" and after he had used this expression several times the witness says: "I went back to the bed where he was lying and spoke to him, and took him by the hand, and said: 'Charley, do you know me?' and he hocked the blood out

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of his mouth and said: 'Mr. Martin.' I said, 'Charley, this is a horrid, bloody affair.' I said: 'Who did it,' and he said 'Frank Fletcher.' He said that just one time. He seemed to be suffering greatly, and I thought he would rally, and I would have a further conversation with him. I thought it was not right to talk with him." Statements as to the person who committed the crime, similar to those made to the witness Martin, were also made by the deceased to the attending physicians and the deputy sheriff a short time before Martin called, and to one Irons, about nine o'clock of the same evening, and while he was in about the same physical condition. Under these circumstances we think the declarations were competent evidence. Here was a man lying on his bed in a semicomatose condition, suffering from a mortal gunshot wound, from which he never rallied, and which speedily proved fatal, and declaring at intervals that he could not live. Not a word seems to have been said by the physicians, the deceased, or any one else, indicating that there was the slightest hope of his recovery, or that he had in any way changed his opinion as to the result of the wound, as expressed to the boy Olinger on the evening before. When we consider these circumstances, and his physical condition, of which he was manifestly conscious, we cannot doubt that he was under a sense of impending death at the time the declarations admitted in evidence were made. To render the declarations of a deceased person evidence, it must appear that they were made under a sense of impending death, and when the deceased had no hope of recovery; but it is not necessary to prove the existence of such belief by any express statements of the deceased, but it may be inferred from all the circumstances. "It is enough," says Mr. Greenleaf, "if it satisfactorily appear in any mode that they were made under that sanction; whether it be directly proven by the express language of the declarant or be inferred from his

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evident danger, or the opinion of the medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind": 1 Greenleaf, Evidence, § 158; Kerr, Homicide, § 412; *People v. Simpson*, 48 Mich. 474; *Fitzgerald v. State*, 11 Neb. 577; *State v. Johnson*, 9 Criminal Law Magazine, and note.

2. The witness Olinger, who at the same time was shot in the neck and hand, remained alone all night with the deceased, and in the morning started to his own home about a mile and a quarter distant, but returned because, as he testified, he was afraid that two persons whom he saw going from the barn along the fence, but did not recognize, would kill him. An attempt was made by the defendant to impeach this witness by showing that he had stated to one Jessie McKinney, or in his presence, that one of the men he saw coming from the barn on the morning after the shooting, was the defendant, but on an objection by the state, the evidence was rejected. The object of this proposed evidence was to impeach the witness by showing that he had made statements out of court inconsistent with his testimony, but, if the court below was in error in supposing that a proper foundation had not been laid for its admission, the exclusion of the evidence was harmless error because the witness admitted on the stand that he had so stated to different persons. When we remember that he claims to have recognized the defendant at the time of the shooting, as one of the persons who so foully attempted to murder him, it is not surprising that on the following morning, alone in the mountains, a mile and a quarter from home, and suffering from his wounds, the boy should have thought or imagined that one of the persons he saw coming from the barn, as he supposed, was the defendant.

3. The next assignment of error is in the refusal of the court to permit the defense to use the pistol and cart-

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ridges found on the person of the defendant at the time of his arrest, and admitted in evidence, for the purpose of testing the shooting capacity of the pistol by shooting into a section of a log taken from the cabin in which the deceased was shot, for the purpose of showing that a ball from this pistol would penetrate much further into the wood than the evidence showed was done by the pistol that probably did the killing. The evidence tends to show that about eleven o'clock on the night of the shooting, after the deceased and the boy Olinger had gone to bed, two persons came to the house and knocked on the door, when the deceased told them to come in, which they did by bursting the door and said: "Money or your brains!" The deceased told them he had no money, whereupon they demand jewelry, and this being refused, they commenced firing, and fired about ten or twelve shots in all, some taking effect in the wall of the house. It was not shown from what points or position in the room any of the balls embedded in the wall were fired, or that the cartridges were the same as those in evidence, or that the distance from which the shots were fired was known, or that any of the conditions under which it was proposed to experiment with the pistol, existed at the time the shots were fired into the wall. Without such a showing it is manifest there was no error in the ruling of the court. Experiments of this nature, to furnish data for certain inferences, must be based as nearly as possible upon conditions and circumstances like those existing in the case on trial, otherwise the tendency is to mislead and confuse the jury: *State v. Justus*, 11 Or. 179; *Commonwealth v. Piper*, 120 Mass. 185. It was not shown in this case that there was any similarity in the conditions under which it was proposed to make the experiment and those existing at the time the shots were fired into the wall, and hence there was no error in the ruling of the court.

4. The next assignment of error is in the refusal of

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the court to allow the defendant to prove by A. J. Denniston, Henry James, Edw. Brown, and other witnesses, that the said A. J. Denniston has a son by the name of Walter, about twenty years of age, light complexion, and about the same stature of the defendant, who, in the month of November prior to the murder, threatened to kill the deceased because of some trouble with his father, and that on the morning of the tenth of November, between the hours of three and four o'clock, Walter, accompanied by another person of about his own age, came down from off the mountain, from the direction of Fletcher's mill, stopped at the warm springs about five miles from deceased's cabin, and called his father out of bed, and told him that he had come to see him for the last time, "that he had killed that son of a bitch of a Petre and his kid"; that at this time Walter Denniston had on clothing corresponding with that described by the boy Olinger as having been worn by the defendant at the time of the killing, and that immediately after making this statement to his father, Walter and his companion left the warm springs, and his present whereabouts is unknown. This testimony was, we think, clearly inadmissible. There was no evidence whatever tending to connect Walter Denniston with the commission of the crime, excepting his own admission and his previous threats, and that he was seen five miles from the place of the homicide four or five hours after it was committed, coming from the direction of Fletcher's mill, wearing clothing corresponding with that worn by one of the guilty parties as described by the boy Olinger. Such evidence affords no reasonable presumption or inference as to the guilt or innocence of the defendant, and is *res inter alios acta*, and the merest hearsay.

In *Greenfield v. People*, 85 N. Y. 76, the defendant, under an indictment for murder, and against whom the evidence was only circumstantial, offered in evidence a letter written by one Royal Kellogg to his brother, which,

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among other things, contained the following language: "Tell me all about the murder. If you think it all right, tell them I am in Lafayette, and if they want me they can come and get me." And in connection with this letter also offered the testimony of a witness to show the declarations of Kellogg and his brother and another person, made a short time after the murder at a place about three fourths of a mile distant. The witness was awakened by the barking of a dog about four o'clock in the morning, and, on looking out of the window, he recognized the two Kelloggs and one Taplip, who had a double-barreled gun and a bag with something in it. After testifying to the suspicious conduct of the parties, the prisoner's counsel offered to prove by the witness that Taplin said to the Kelloggs, "You were damned fools to do it," and one of the Kelloggs replied, "If we had not done it we should all have been hung." It was held this evidence was properly excluded, MILLER, J., saying: "Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide, they would tend clearly to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense—was not part of the *res gestæ*, and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders, and no rule is better established than that extra-judicial statements of third persons are inadmissible. * * * While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to

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point out some one besides the prisoner as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose. In considering the question, we have carefully examined the numerous authorities cited to sustain the position that the evidence was competent, and none of them hold that under such circumstances it could lawfully be received, and it was neither admissible alone or in connection with the letters referred to." In *West v. State*, 76 Ala. 98, it was held that the admission or confession of another person, made on his deathbed, that he committed the crime, is mere hearsay, and not admissible as evidence in the case.

In *Walker v. State*, 6 Tex. App. 576, on an indictment for murder, it was held incompetent for the accused to prove that a very short time before the homicide a person other than the accused made threats to take the life of the deceased, the court saying: "The issue on the trial was the guilt or innocence of the defendant on trial. Evidence is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and for the good reason stated for the rule by Mr. Greenleaf, that such evidence tends to draw away the minds of the jury from the point in issue, and to excite prejudice, and mislead them: 1 Greenleaf, Evidence, §§ 51, 52." So in the case of *State v. Davis*, 77 N. C. 483, which was also an indictment for murder, the prisoner proposed to prove by one Peck "that George Nicks had malice toward the deceased, and had a motive to take his life, and opportunity to do so, and had threatened to do so before the court." He further offered to prove by one Rice, "that one Peck took a gun, and went in the direction of the house of the deceased with the threat that he was going to kill the deceased some time before the deceased was killed."

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This evidence was held incompetent, the court saying: "Both exceptions are untenable, and have been repeatedly so held by this court; the first, because they are declarations of a third party, and are *res inter alios acta*, and have no legal tendency to establish the innocence of the prisoner, and the second for the same and the additional reason that the time is too vaguely and indefinitely set forth. * * * Such evidence is inadmissible because it does not tend to establish the *corpus delicti*. Unquestionably it would have been competent to prove that a third party killed the deceased, and not the prisoner. But this could only have been done by proof connecting Peck with the fact—that is, with the perpetration of some deed entering into the crime itself. Direct evidence connecting Peck with the *corpus delicti* would have been admissible. After proof of the *res gestae* constituting Peck's alleged guilt had been given, it might be that the evidence which was offered and excluded in this case would have been competent in confirmation of the direct testimony connecting him with the fact of killing. No such direct testimony was offered here. It is unnecessary to elaborate, as the questions of evidence here made have been fully discussed and decided by this court in many cases." Indeed, there seems to be an absolute unanimity in the decisions in holding that it is going far enough in favor of the accused to allow him to exculpate himself by showing the fact of another's guilt by some appropriate evidence directly connecting that person with the *corpus delicti*, and in criminal cases mere evidence of confession of guilt by a third person, or of threats made by such person against deceased, is clearly inadmissible: Bishop, Criminal Procedure, § 623; Wharton, Criminal Evidence, § 225; Wharton, Homicide, § 693; 4 Am. & Eng. Enc. 866, and authorities cited; *State v. Beaudet*, 53 Conn. 536; *Woolfolk v. State*, 81 Ga. 551; S. C. 85 Ga. 69; *State v. Bishop*, 73 N. C. 44; *Rhea v. State*, 18 Tenn. 256.

Points decided.

The other assignments of error in the record have been carefully examined and considered and we find no error therein. The judgment of the court below will therefore be **AFFIRMED**.

[Decided June 29, 1893.]

COLE v. LOGAN.

[S. C. 83 Pac. Rep. 568.]

1. **IRRIGATION—PRIOR APPROPRIATION OF WATER—TITLE BY RELATION.**—One who, two and a half years before the building of a dam by another, settles upon government land, and diverts and appropriates the water of a creek for the purpose of irrigation, is a prior appropriator of such water, although he does not make final proof of his claim and obtain a patent therefor until after the other obtains his patent; in such case the title relates back to the time of the settlement: *Faull v. Cooke*, 19 Or. 455; *Larsen v. Or. Ry. & Nav. Co.* 19 Or. 240, cited and approved.
2. **WATER RIGHTS—DILIGENCE AND PECUNIARY CONDITION OF APPROPRIATOR.**—To entitle a claimant of a water privilege to hold his rights, he must commence to divert the water within a reasonable time after his settlement or claim, and must prosecute the work to completion with reasonable diligence. Ill health or pecuniary inability of a claimant will not excuse the failure to actually appropriate the water within a reasonable time.
3. **IDEM.**—One who spends ten years in completing a ditch for purposes of irrigation, over a new survey, after having been compelled to abandon a prior one by reason of encountering quicksand, doing little more in the ten years than he had before in two years in the same kind of land, giving as a reason for his delay his inability to raise the necessary means to prosecute the work,—fails to prosecute the work with such reasonable diligence as will permit his appropriation of water thereunder, to date back to the time of commencing the work.
4. **IDEM—PURPOSE AND AMOUNT OF APPROPRIATION.**—Water may be appropriated for beneficial purposes in such quantities as may be necessary, provided it be done with reasonable promptness (*Simmons v. Winters*, 21 Or. 84, and *Hindman v. Risor*, 21 Or. 112, cited and approved); but such use cannot be suspended for a long time and then resumed to a greater extent than before, to the injury of subsequent appropriators on the stream.
5. **APPROPRIATION OF WATER—ABANDONMENT.**—A prior appropriator of water for the purpose of irrigating his homestead, who, after getting a part of it under cultivation, fails to add to his improvements, and permits a portion of the cultivated part to grow up to willows, will be

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Statement of the case.

entitled, as against subsequent appropriators, to only a sufficient amount of water for the irrigation of the cultivated part.

6. **DIVERSION OF WATER.**—A prior appropriator of the water of a creek for irrigating purposes cannot move his point of diversion above the dam of a subsequent appropriator, so as to injuriously affect the latter's rights.
7. **COSTS—DISCRETION OF COURT—CODE, § 554.**—The trial court is invested with a discretion in allowing costs in equity cases, which will not be reviewed except for an abuse thereof: *Lovejoy v. Chapman*, 23 Or. 571, approved and followed.

Malheur County: JAS. A. FEE, Judge.

J. L. Cole and B. F. Kendall sought to enjoin Wm. L. Logan from diverting the waters of Willow Creek. There was a decree dividing the water, and both parties appeal. Modified.

Olmstead & Courtney, for Plaintiffs.

R. G. Wheeler, and *J. L. Rand* (*C. A. Johns* on the brief), for Defendant.

The material facts are that Willow Creek rises in a spur of the Blue Mountains, flows in a southeasterly direction in a well-defined channel through the lands of the parties hereto, and empties into the Malheur River in Malheur County, Oregon; that the defendant has diverted the waters thereof by a ditch on the north side of the creek, and the plaintiffs by a ditch on the south side, and that their lands are arid and nearly valueless without water, but by irrigation they have become very productive and yield large crops of hay and fruit. The defendant settled upon his tract in July, 1870, built a dam in the channel of the creek, dug a ditch, and conducted the water to a garden of about two acres, cultivated by him in 1871. On January 27, 1872, the said tract having in the meantime been surveyed and platted as the east half of the northwest quarter and the west half of the northeast quarter of section twenty-four, in township fifteen south, of range forty-two east, of the Willamette Meridian, he filed a pre-

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emption declaratory statement thereon, which, on November 3, 1874, he commuted into a homestead, made his final proof July 5, 1880; and on December 10, 1880, obtained the United States patent. The plaintiff, J. L. Cole, in October, 1871, made a homestead filing upon the south half of the southeast quarter, the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, of section fourteen, in said township and range, and on November 30, 1878, obtained a patent therefor. About December, 10, 1872, the said Cole and one C. Eaton commenced to build a dam in the channel of said creek at a point about three miles above defendant's dam, which they completed about January 10, 1873, and about three months thereafter they had completed about one mile of the ditch from the dam towards their lands. Eaton assigned his interest in the ditch to one James Cole, who filed a preëmption claim upon the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of section fourteen, in said township and range, and on October 30, 1882, obtained the United States patent therefor, which tract of land and interest in the ditch he conveyed to the plaintiff, B. F. Kendall, who is now the owner thereof. In October, 1871, the defendant surveyed a line for a new ditch from his homestead to a point on the creek about one mile below that where plaintiffs afterwards built their dam, and, on January, 1872, filed with the county clerk of the proper county a notice of his claim to appropriate two hundred and fifty inches of the water of said creek, and commenced to dig the ditch on the line of the survey, but, encountering quicksand after completing it to a point within six feet of the creek, he was obliged to abandon it, and in 1873, surveyed another line to a point about thirty yards above plaintiffs' dam, and commenced to dig a ditch on the new line, and, after working thereon each year, and expending about two thousand dollars, he completed it

Statement of the case.

in 1883. The plaintiffs assisted him in building a new dam, moved their tap to this point, and, as they testify, agreed that the defendant might have the surplus water of the creek. On March 6, 1883, the defendant acquired the legal title from one W. R. Kelly and wife to the northeast quarter of the southeast quarter of said section fourteen, and moved to a house thereon about one-half mile from his former home. The defendant also claimed a possessory right to the southwest quarter of section thirteen in said township and range upon a preëmption filing thereon, but the title thereto was also claimed by The Dalles Military Wagon Road Company.

From 1872 to 1891 the El Dorado Ditch Company had diverted about one thousand inches of water from Burnt River, and discharged it into Willow Creek about twelve miles above defendant's homestead, and in 1877 the defendant had permitted the Willow Creek Irrigating Company to enlarge the ditch first made by him, and convey the water of Willow Creek across his homestead to irrigate lands lying below his claim. A small stream known as Becker Creek flowed across the Kelly tract, and another small stream known as Pole Creek flowed across the plaintiff Cole's land, and each emptied into Willow Creek at places above the defendant's point of diversion on his homestead. Kelly and the defendant used the waters of Becker Creek in irrigating the Kelly place, and Cole had used the waters of Pole Creek. The defendant, prior to 1877, had cultivated about twelve acres of his homestead, but after the Willow Creek Irrigating Ditch Company had enlarged his ditch, the cultivated land on the homestead had nearly grown up with willows. The plaintiffs and defendant used the same dam, and diverted the waters of the creek at opposite points, from 1884 to 1889, when, the dam becoming filled with debris from the mines above, plaintiffs moved their tap further up the stream, and on May 19, 1891, the defendant moved his tap

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above theirs and diverted the water for five hours, whereupon the plaintiffs again moved their ditch above his, diverted all the water of the creek, and commenced this suit, in which they allege a prior appropriation of the whole amount of water, consisting of about four hundred inches, and a diversion thereof by defendant, who denies the allegations of the complaint, except the diversion of one hundred and fifty inches, and alleges that he was the prior appropriator of the said waters. After the issues were completed the testimony was taken before a referee, and at the hearing the court found that defendant was the prior appropriator of twenty inches of water, and decreed that he was entitled to divert that quantity, under a six-inch pressure, and that plaintiffs were entitled to divert three hundred inches under a like pressure, and that neither party should recover costs, from which decree the defendant appeals; while the plaintiffs appeal from so much thereof as decrees the prior right of defendant to twenty inches of water and enjoins them from interfering therewith, and also from the portion thereof relating to costs. Modified.

MR. JUSTICE MOORE delivered the opinion of the court:

1. The evidence conclusively shows that the defendant was a prior appropriator of the waters of Willow Creek. He made his settlement upon an unsurveyed tract of land with the intention of acquiring title thereto from the government of the United States, and had diverted and appropriated the water of said creek two and one half years prior to the building of plaintiffs' dam, and when the defendant made his proof and obtained his patent his title related back to the time of his settlement: *Faull v. Cooke*, 19 Or. 455 (26 Pac. 662); *Larsen v. Or. Ry. & Nav. Co.* 19 Or. 240 (23 Pac. 974); *Sturr v. Beck*, 133 U. S. 541 (10 Sup. Rep. 350); and hence it follows that at the time plaintiffs made their appropriation of the waters of Wil-

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low Creek the defendant's rights as a prior appropriator had attached, and he was entitled to the quantity of water he had diverted and appropriated for the purpose of irrigating his homestead, and that the plaintiffs made their diversion and appropriation subject thereto; *Kaler v. Campbell*, 13 Or. 596 (11 Pac. 301).

2. The evidence shows that on Willow Creek there was a local custom which required the claimant to file for record with the county clerk a notice of his claim to appropriate the water of a natural stream, and that in pursuance of such custom Logan, in January, 1872, filed with the county clerk of Baker County a notice of his claim to appropriate two hundred and fifty inches of the water of said creek upon the line of his survey made in October, 1871. If, instead of being obliged to abandon his ditch on this line in 1873, he had completed it, so as to have been able to divert the water thereby, and appropriate it in irrigating his homestead, he would, doubtless, have had a prior right to the use of a sufficient quantity to irrigate his land, assuming that his diversion was begun within a reasonable time, and was prosecuted with due and reasonable diligence; and his appropriation would have related back at least to the time of commencing the work, if not to the time of giving the notice or to the time of the survey: *Pomeroy, Riparian Rights*, § 52. When he abandoned the survey of 1871, and made another to tap the creek at or near plaintiffs' dam, in order to enable him to hold the rights acquired under such original survey, he must have commenced the diversion within a reasonable time, and must have prosecuted it with due and reasonable diligence. In *Ophir Min. Co. v. Carpenter*, 4 Nev. 534, LEWIS, C. J., in a similar case, says: "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual

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with men engaged in like enterprises, and who desire a speedy accomplishment of their designs; such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. * * * It would be a most dangerous doctrine to hold that ill health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in the law. Nor are we disposed to adopt it as the rule to govern cases of this kind." The authorities clearly show that the claimant's pecuniary condition is not an excuse, and, though the doctrine may seem harsh, it is nevertheless right. If the rule were otherwise, the prior settler on a creek, if he were ill or poor, could make a survey from his claim to some desirable point above him on the stream, or give any other notice of his intention to appropriate the water, and by doing such work as his health or means would permit, could ultimately divert the water at such point, and claim a prior right, without regard to the number of subsequent appropriators below such point of diversion or above it, when the water was used and returned before it reached the claimant's land.

3. While the evidence shows that the ditch on the line of the new survey was commenced in 1873, that some work was done thereon each year, and that it was completed so as to divert the water in 1883, at a cost of about two thousand dollars, it fails to show what amount of labor or of money was expended thereon in any one year, and Logan pleads as an excuse for the delay his inability to raise the necessary means to prosecute the work. The evidence further shows that from 1871 to 1873, Logan dug about one and one fourth miles of ditch, and that quite a portion of it was through quicksand, but

that it took ten years to dig about one and one half miles to complete the new ditch. It does not appear that there was much difference in the character of the country through which the new ditch was dug as compared with that along the line of the old one, nor that it was difficult to procure labor or material for the work; and the only excuse for delay being pecuniary inability, we must conclude, in connection with the other facts, that the defendant did not prosecute his diversion with due and reasonable diligence, and that he could have completed the ditch much sooner than he did. Hence it follows that Logan could not by the completion of his ditch in 1883, claim a diversion of the water so as to relate back to 1871, and that the diversion at this point was subsequent to plaintiffs.

4. The defendant, as a prior appropriator, is entitled to a quantity of water sufficient to irrigate his homestead, and his original appropriation may be made with reference to the quantity of water needed to irrigate the land he designs to put into cultivation. "The needs or purpose for which the appropriation is made, is the limit to the amount of water which may be taken": *Simmons v. Winters*, 21 Or. 34 (27 Pac. 7). The defendant, as a prior appropriator, did not find it necessary to divert or appropriate in 1871 all the water he ultimately intended to use in the irrigation of his lands. As he adds to the area of his cultivated land he may increase the amount of his diversion until he has acquired the quantity necessary to properly irrigate the whole tract, and any subsequent appropriator diverts the water subject to such prior claim. To entitle the defendant, however, to the benefit of such an appropriation, he should, within a reasonable time, apply the water to such beneficial use. As fast as he can reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose. The rule established in *Simmons v. Winters* is just and reason-

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able; but it is not intended that because a prior appropriator is entitled to a given quantity of water necessary to irrigate the land he intends to cultivate, he can suspend his improvements an unreasonable time, and then, by adding to the area of his cultivated land, be restored to his original intentional diversion, when subsequent appropriators have acquired rights in the stream. The fact that he for an unreasonable time delays additional cultivation should be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, should be confined to his necessary use as applied to the lands he had cultivated within a reasonable time before any subsequent rights had accrued: *Hindman v. Rizer*, 21 Or. 112 (27 Pac. 13).

5. The defendant, however, having made a prior appropriation of the water at his homestead, has the prior right to the use thereof, unless he has abandoned his claim thereto. The fact that he in 1873 commenced the survey of another ditch from his homestead to tap the creek at a point further up the stream shows that he had not abandoned the idea of irrigating his land; and while it appears that his old ditch had been in 1877 enlarged and used, with his consent, by the Willow Creek Irrigating Company, it also appears that from 1872 to 1891 the El Dorado Ditch Company had diverted about one thousand inches of water from Burnt River, and discharged the same into Willow Creek at a point above defendant's homestead, and thus it would seem to follow, in the absence of any evidence of the right of the Willow Creek Irrigating Company, that it took no rights from the defendant therein except as to the surplus water from Burnt River, and that defendant had claimed and reserved his right to the use of his original diversion from Willow Creek. The evidence also shows that defendant had at one time cultivated on his homestead about twelve acres, but that since he moved

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from that tract he not only failed to add to its improvement, but has permitted the portion of it so cultivated to grow up in willows, which, taken in connection with the facts and circumstances of the case, indicates that the defendant had abandoned his intention to increase the area of cultivated land upon his homestead. The court below found that twenty inches was the quantity to which he was entitled, and while there is much conflict of testimony upon this subject, we do not feel like disturbing this finding. It is to be presumed, however, since the waters of Becker Creek flow across the Kelly tract, and the defendant uses it for irrigation thereon, that the court must have considered this fact, and that the award of twenty inches must have been from the waters of Willow Creek, and did not include any of the water of Becker Creek.

6. The defendant having made a diversion of the water in 1871 could not thereafter change the point of his diversion if it injuriously affected the rights of any subsequent appropriator: *Kidd v. Laird*, 15 Cal. 161; *Butte Mining Co. v. Morgan*, 19 Cal. 609. Did the change of the point of diversion injuriously affect the plaintiffs? It appears from the evidence that the plaintiffs diverted and used all the water of the creek, but that the plaintiff Kendall returned the waste water to the creek at a point above, and the plaintiff Cole at a point below defendant's land. If Kendall, as a subsequent appropriator, had, with knowledge of the defendant's diversion, tapped the creek at a point above, used and returned the whole volume of the water above the defendant's point of diversion, the defendant could not have been injured thereby, while under the same state of facts the defendant, by changing his point of diversion and tapping the creek above Kendall's dam, could have taken the whole amount of the water and would have injuriously affected that plaintiff. If by taking the whole the plaintiff Kendall would have been affected, he would also have been affected injuriously by the taking of

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a part, and hence it follows that any change made by the defendant to a point above plaintiff's dam would injuriously affect their right. The defendant is entitled to the flow of twenty inches of water in the channel of the creek, and may divert the same at any point below the plaintiff's dam, for the purpose of irrigating any of his lands. The testimony does not show what amount of water flows in the channel of the creek at any place below this dam, and the plaintiffs will be enjoined from diverting the waters from the channel of said creek so as to reduce defendant's supply to less than twenty inches of water, not including that of Becker Creek, and this quantity will be measured under a six-inch pressure at a point below that where the plaintiff Kendall's ditch enters the creek.

7. Appellants contend that they should have had a judgment for their costs and disbursements. Section 554, Hill's Code, provides that in equity cases the party in whose favor a decree is rendered shall be allowed his costs and disbursements in like manner and amount as in an action unless the court otherwise directs. This invests the trial court with a discretion in the taxation of costs and disbursements, and such discretion will not be reviewed except for an abuse thereof: *Lovejoy v. Chapman*, 23 Or. 571 (32 Pac. 687). The plaintiffs' cause of suit was based upon an alleged prior appropriation, while the court found that the defendant was the prior appropriator, and there were also many equities in favor of the defendant which the court considered, and hence the conclusion upon the taxation of costs was not an abuse of discretion.

The decree of the court below will be modified and one entered in accordance with this opinion. MODIFIED.

Opinion of the court—Lord, C. J.

[Decided June 29, 1893.]

BROWN v. OREGON LUMBER CO.

[S. C. 33 Pac. Rep. 557.]

1. **NONSUIT*—SUFFICIENCY OF EVIDENCE.**—A motion for a nonsuit is in the nature of a demurrer to the evidence,—it admits the truth of the plaintiff's testimony, together with every inference of fact which the jury may legally draw from it. The sufficiency of the evidence is for the jury, provided the court shall be of opinion that there is any evidence tending to sustain the complaint.
2. **MASTER AND SERVANT—ASSUMING RISK.**—A servant assumes not only the risks ordinarily incident to his employment, but also such increased risks as he knowingly and voluntarily undertakes. Under this rule a servant who was employed with others in piling ties in a box car, blocking them as piled, but ceases to block them upon the direction of the foreman to hurry up, and the pile of ties falls on him, cannot recover, as the increased risk from not blocking the pile was evident, and he must be considered to have assumed it.

Baker County: MORTON D. CLIFFORD, Judge.

Action by Paton Brown against the Oregon Lumber Company to recover damages for personal injuries. A nonsuit having been granted, plaintiff appeals. Affirmed.

Williams & Smith, for Appellant.*Johns & Rand*, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This was an action brought by the plaintiff to recover damages from the defendant for an injury sustained by him while employed in its service. The alleged negligence of the defendant consisted of carelessly causing a pile of railroad ties to be so placed in a box car, which plaintiff was assisting in loading, that the ties fell upon him, producing the injury complained of. Substantially the facts are, as appears from the testimony, that the

*NOTE.—See also *Hurbert v. Dufur*, 23 Or. 462, on this point.—REPORTER.

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38*	708
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46	242
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Opinion of the court—LORD, C. J.

defendant is a corporation, engaged in operating a saw mill, manufacturing railroad ties and lumber, and that it had a quantity of such ties at Pleasant Valley, on the line of the Union Pacific Railroad, ready for transportation; that one Carver was employed by the company to load box cars with ties, and was also authorized to hire men to aid in the work of loading them; that he hired the plaintiff at his own request, and also employed others, among whom was plaintiff's son, to assist in performing such work, and that there were in all six men, including Carver, who acted as foreman, engaged in the work; that in going into the car, two men would carry a tie, one carrying each end, so that each two men would carry every third tie into the car and put it into place; that the plaintiff and his son worked together; that the ties were six inches thick and eight inches wide, and were piled, one on top of the other, nine or ten high. At the time the accident happened, the car was almost loaded with ties, and plaintiff and his son had assisted in carrying in about four piles of such load into this car. Just before the accident happened, they entered the car, one ahead of the other, and the length of a tie apart, and, placing the tie which they were carrying on the floor, turned around and were going out, when the pile fell and struck the plaintiff, knocking him out of the car, and causing him the injury complained of. The testimony also shows that the plaintiff and his son had been engaged in such work about three weeks, as likewise had the others, including Carver, who was anxious, as this was the last car, to have it loaded in time for transportation; that the usual manner of piling ties in a car was by blocking, and that they had been so piling and blocking when Carver ordered them to hurry and pile them in one on top of another. Upon this state of facts the defendant moved for a nonsuit, on the ground of the insufficiency of the evidence, which the court granted, and from the judgment rendered therein this appeal is brought.

Opinion of the court—LORD, C. J.

1. The principal contention of the plaintiff is that the court erred in allowing defendant's motion for a nonsuit. A motion for a nonsuit is in the nature of a demurrer to the evidence; it admits not only all that the evidence proves, but all that it tends to prove. The evidence given for the plaintiff must be taken to be true, together with every inference of fact which the jury might legally draw from it. Whether there is any evidence tending to prove the material allegations upon which a cause of action is based is a question of law for the court, but whether a given amount of evidence is sufficient to sustain such allegation is a question of fact for the jury. When there is no evidence tending to sustain the plaintiff's cause of action, it is the duty of the court to grant the nonsuit and withdraw the case from the jury. As TENNEY, C. J., said: "When the plaintiff's evidence, taken in its full strength, has no tendency, in the opinion of the judge, to maintain the issue for him, it is an useless consumption of time to hear evidence in defense, and after that direct a nonsuit": *Bradon v. Appleton M. F. Ins. Co.* 42 Me. 260. Certainly it would be an idle proceeding to submit evidence to a jury when they could justly find one way only: *North Pennsylvania R. R. Co. v. Commercial National Bank*, 123 U. S. 733 (8 Sup. Ct. Rep. 266).

2. We are to inquire, then, whether the injury of which plaintiff complains was caused by the negligence of the defendant, or by the contributory negligence of the plaintiff. The general rule of law is that a servant assumes all the risks ordinarily incident to his employment, and also all additional or unusual risks which he may knowingly and voluntarily undertake. It is one of the implied conditions of every contract for employment that the servant is competent to discharge the duties for which he is employed: *Wood, Master and Servant*, 166. In accepting service, he not only assumes the risks reasonably to be anticipated as incident to it, but he also

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assumes that he has the capacity to understand the nature and extent of such service, and has the requisite ability to perform it. It is his fault if he undertakes the employment without sufficient skill, or applies less than the occasion requires. As the plaintiff is a man of sixty years of age, and possesses ordinary sense and intelligence, it legally results that when he accepted employment in loading box cars with ties, he asserted and assumed that he had the requisite capacity to understand and discharge the duties of workmen engaged in such employment.

The next inquiry is, whether it was such negligence on the part of the defendant to pile the ties in the car without blocking, under the circumstances indicated, as would render it liable for the injury the plaintiff incurred. It is the duty of the master to conduct his business, or the work in which he is engaged, so as not to expose his servants to risks or dangers which may be guarded against, or avoided, by the exercise of due care. His duty in this regard is the same as devolves upon him to select competent servants, or supply them with appliances suitable to do the business or work in which they are engaged. If the mode of doing the work is dangerous, and not apparent, he is bound, if the servant is inexperienced, and does not comprehend it, to point out and explain such danger so as to enable him to understand it and do the work safely. But when the mode of doing the work requires no particular skill or experience, and the liability to injury can only arise from its negligent performance, or where the doing of such work in some other mode may be less secure, but the increased risk is apparent and understood by any one of ordinary sense and intelligence, if the servant voluntarily undertakes it, the master is not liable for an injury resulting to him. The evidence shows that the usual mode of piling ties was by blocking them as they were piled, and that this mode was pursued until the last car was reached and partially loaded, when the foreman told the men to hurry up and

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pile them one on another. It is not clear by the record that he meant by this that they should cease blocking the ties as they piled them; on the contrary it affirmatively appears that such order was not made in direct terms. It seems, however, to have been so understood by them, as, after this direction to hurry up, they piled them without blocking until the car was nearly filled, when the tier they were piling up fell and injured the plaintiff. The ties were eight inches wide and six inches thick, all the surfaces of which were flat, and they were piled nine or ten high, which would make the height of a tier five feet. It is plain, nor is it disputed, that with such a surface the ties could be piled one on another five feet high with reasonable safety against their falling, as several tiers had been so piled; but it is equally plain that to so pile them without blocking is less secure against falling than with blocking. Necessarily, as the height of the tier increases, unless commensurate care is observed, its tendency to fall is augmented. The risk of doing the work, however, was open to any observation. It needed no special knowledge to discover it. The piling of ties is not a work in which any peculiar knowledge or experience is involved, but is a work in which all have the same opportunity of judgment. Plaintiff knew and appreciated, just as well as the foreman, the nature of the risk involved in the different mode of piling the ties. A servant not only assumes the risks ordinarily incident to his employment, but he also assumes such increased risks as he may knowingly and voluntarily undertake. In such case the servant is not bound to incur the increased risk unless he chooses, but, when he understands and appreciates it, he is responsible himself for an accident arising out of his performance of such services; so that if the risk was increased by the change in the mode of piling the ties, such risk being open and appreciable to any one of common observation and experience, it was voluntarily undertaken. The cases cited in refer-

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ence to work of a dangerous character, or orders given under circumstances which exposed the servant to unusual risk, where the negligence consists mainly in not informing him, have no application to the present case. Under the circumstances of this case we do not think there was any error. **AFFIRMED.**

[Decided June 29, 1893.]

JOHNSON v. HAMILTON.

[S. C. 33 Pac. Rep. 571.]

1. **CUSTOM AND USAGE—EVIDENCE.**—In an action to recover the contract price of sawlogs, which were to be "suitable and usual" for defendant's mill, and the "commercial purposes" thereof, it is not error to refuse to allow plaintiffs to cross-examine as to the lengths of logs delivered, in order to show their unsuitableness, meaning of the terms quoted, unless the terms are shown to have a local or peculiar significance, or the witness is qualified to testify on the subject.
2. **EVIDENCE.**—In an action to recover the contract price for cutting sawlogs, a written notice by the defendant of a rescission of the contract given after the action was commenced, cannot be admitted on the ground that it explained the plaintiffs' failure to put the logs already cut on the railway, where the notice does not in terms forbid this, and the plaintiffs have testified that the defendant requested them to put them on, and they refused to do so unless the notice was rescinded.
3. **EVIDENCE—PAYMENTS.**—The withdrawal from the consideration of the jury, of all testimony in regard to payments not made directly on a contract in suit, is reversible error where money was due for former work at the time the contract was entered into, and the payments were made on account without special reference to such former work or to the work done under the contract, as this was virtually withdrawing from the jury all evidence of payment and left them no basis on which to compute the amount remaining due on the contract.
4. **DAMAGES.**—The question of damage done by cutting the convenient timber to the neglect of the more remote, under a contract for cutting the whole timber, cannot be submitted under an assignment of a breach in cutting the timber on the ground cut over, and leaving suitable timber thereon not cut into sawlogs, and cutting and delivering unsound logs

Union County: **MORTON D. CLIFFORD, Judge.**

Statement of the case.

Action by W. R. Johnson and George Hull, partners, against R. D. Hamilton, to recover the price of an installment of logs delivered under a contract. Judgment for plaintiffs, and defendant appeals. Reversed.

Robert Eakin, for Appellant.

T. H. Crawford, for Respondent.

This is an action to recover the contract price of nine hundred and ninety-eight thousand feet of saw logs alleged to have been delivered by plaintiffs to defendant in pursuance of a contract made and executed on the twenty-ninth day of December, 1890, by defendant as party of the first part, and plaintiffs as parties of the second part, the material portions of which are: "That whereas the first party is the owner of certain timber lands, and a saw-mill situated thereon, more particularly described hereinafter, which mill he desires to operate for commercial purposes, and furnish from his said timber now standing and growing upon said lands; and now in consideration of this and the hereinafter premises, the second parties hereby undertake and agree with the first party to proceed on the first day of January, 1891, and at their own expense and labor, to cut down, and to convert into suitable and usual saw logs, not to exceed in any instance twenty-four feet and four inches in length, * * * and to deliver same upon rollways of first party, ready for the saw, at first party's said saw mill," situated on certain premises described in the contract, "all sound fir, tamarack, and pine timber which will square seven by eight inches, and make merchantable lumber, which is standing or situated upon" certain real estate in the contract described, and "to furnish all such logs to first party's mill as fast as said mill can saw and dispose of the same to the amount of at least thirty-five thousand scaled feet per day if required by the first party. All of said timber

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is to be scaled by a competent scaler to be selected by both parties as fast as delivered, and each party is to pay half of his wages not to exceed two cents per one thousand feet. In case that the first party fails to provide rollways fast enough for second party to place the same thereon, then the logs may be approximate on the bank, but the same is not final till on the rollway. The aforesaid logs are all to be furnished by the second parties to the first as aforesaid as rapidly as possible and within three years hereafter, and the second parties are bound herein to cut over the ground so as not to cull or take from the convenient and neglect the remote portions of the ground to be cut over, and they respond in damages for not complying with this provision. And in consideration of which the first party agrees to pay the second parties for said logs after they are scaled and so delivered, two dollars and fifty cents per one thousand feet; such payments are to be as follows: For the logs furnished during January and February, 1891, to be paid for on the first day of April following, but the second parties' orders for camp supplies and laborers' necessary wages, shall be honored by first party in the meantime not to exceed in the aggregate the amount due for the following months, it shall be due and payable on the fifteenth day of the month following each month for that month. The rollways above mentioned are to be built and maintained as soon as possible."

The complaint avers that plaintiffs entered upon the performance of the contract on the first day of January, 1891, and between that date and the first day of May following cut and delivered to defendant, as provided in the contract, about nine hundred and ninety-eight thousand feet of logs of the stipulated value of two dollars and fifty cents per thousand, amounting in the aggregate to two thousand five hundred and five dollars and two cents; that no part of the same has been paid except one thousand eight hundred and seventy-three dollars and seventy-

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two cents, and that there remains due and owing from said defendants the sum of six hundred and thirty-one dollars and thirty cents thereon. The answer denies that plaintiff cut and delivered on the rollways of defendant, as provided in the contract, any other or greater amount of logs than one hundred and thirty-seven thousand two hundred and seventy-six feet of the contract value of three hundred and forty-three dollars and nineteen cents, and for a further and separate defense avers that on or about the eighth day of February, 1891, and during the time alleged in the complaint, the plaintiffs, in violation of the contract, commenced to cut and deliver other saw logs, and between that time and the first day of May, 1891, cut and delivered at defendant's sawmill about four hundred and twenty-two thousand eight hundred and thirty-three feet of saw logs in the aggregate and no more, but not as agreed by the plaintiffs in their contract, the terms of which they violated as follows, and to defendant's special damage thereby, to-wit: "That in cutting said timber for said saw logs the plaintiffs agreed in said contract to furnish and deliver none but such as should be suitable and usual saw logs for defendant's said sawmill, and the commercial purposes thereof; that said suitable and usual saw logs for defendant's said sawmill and the commercial purposes of said mill required that said logs should be cut in proportionate quantities of the length of twelve and one third feet, fourteen and one third feet, sixteen and one third feet, twenty and one third feet, and twenty-four and one third feet," and that plaintiffs well knew the same when they so contracted, but, unmindful of their said agreement, wilfully and persistently, against defendant's orders, cut nearly all of said logs of from sixteen and one third to seventeen and one third feet, thus leaving an overstock of one length of lumber, and that the balance was of unmerchantable lengths, with no assortment for commercial purposes, as well as a waste to defendant in his timber of

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nearly a foot in the length of each log, to defendant's damage in the sum of two hundred and fifty dollars. "That further the plaintiffs agreed by their contract to cut all of the sound fir, tamarack, and pine timber of a certain size on the ground cut over, and not to cull the same, but that plaintiffs violated their said contract by culling and wasting said timber, leaving suitable saw logs in the tops left on the ground, by culling the trees easiest got at, leaving those requiring more labor and time to so convert into suitable logs, and deliver the same, as well as cutting and delivering a lot of unsound logs (wind-shaken and decayed in nearly twenty per cent of the lot) to defendant's damage in the sum of three hundred and fifty dollars." And, as a further defense, the answer alleges, that during the period from the thirty-first of December, 1890, to the first of May, 1891, the defendant advanced and paid plaintiffs, under and by virtue of said contract, the aggregate sum of two thousand two hundred and sixty-three dollars and eighty-eight cents which is pleaded as a counterclaim and set off to plaintiffs' claim and as an overpayment of the same. The reply denies all the material allegations of the answer.

The trial in the court below resulted in a judgment for the plaintiffs, from which the defendant appeals. Reversed.

MR. JUSTICE BEAN delivered the opinion of the court:

1. The first error assigned and relied upon for a reversal of the judgment relates to the action of the trial court in sustaining objections made by the plaintiffs to questions asked the plaintiff Johnson on cross-examination, as to how many of the logs delivered by him were twelve feet long, and how many of other lengths, and also in sustaining objections to the following questions asked the defendant on direct examination: "What is meant by the term, 'commercial purposes,' as used in the con-

tract?" "What does the term, 'suitable and usual saw logs,' as used in the contract, mean?" "What character of logs does the commercial character of that mill require?" In this we think there was no error. It was the duty of the court and not of the witness to construe the contract, and define the meaning of the terms used therein. If the words, "commercial purposes" and "suitable and usual saw logs," had, by usage or custom, a local or peculiar signification, as defendant now contends, and were so used and understood by the parties to the contract, it would have been competent for the defendant to have shown that fact by the evidence of persons who had such knowledge of the practice and course of business in that particular line as to make them competent witnesses, for the purpose of ascertaining the sense in which the words were used in the contract and to assist the court in its construction: Hill's Code, § 697. It was not, however, shown in this case that the words had any local or peculiar signification, or that the witness was qualified to testify upon the subject. Unless the words "commercial purposes" and "suitable and usual saw logs," did have a local or peculiar signification, and were so used by the parties in making the contract, it is clear that the evidence sought to be elicited from the plaintiff Johnson on cross-examination as to the length of logs delivered by him was incompetent, for the contract does not provide that the logs shall be of any particular length provided they do not exceed twenty-four feet and four inches.

2. It is also claimed that the trial court erred in permitting the plaintiffs to prove that after the commencement of this action the defendant served upon them a written notice rescinding the contract, and refusing to allow them to proceed further thereunder. It is difficult to perceive upon what theory this evidence can be competent under the issues herein. This action was commenced on the eighteenth day of May, 1891, to recover an

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installment then alleged to be due on the contract price of certain logs claimed to have been cut and delivered by plaintiffs to defendant between the first day of January and the first day of May, 1891, in pursuance of a written contract between the parties, by the terms of which all logs so cut and delivered were to be paid for by the fifteenth day of May. The cause of action had therefore accrued, according to the allegations of the complaint, at the time this action was commenced, so that proof of the rescission or attempted rescission of the contract by defendant, after the commencement of the action, could in no way tend to prove any of the allegations of the complaint. For the plaintiffs it is argued, in support of the rulings of the court in admitting this evidence, that it was competent for the purpose of explaining plaintiff's failure to put the logs on the rollways according to their contract, prior to the commencement of the action. From the evidence it appears that part of the logs, for want of room, had not been placed on the rollway at the time the action was commenced, but had been delivered on the bank approximately near, as stipulated in the contract, but at the time notice was served upon plaintiffs the rollways had become empty, and they were proceeding to put the logs thereon when served with notice; and hence, it is claimed, the evidence was competent to show that the failure to put the logs on the rollways was the fault and misconduct of the defendant, and not of the plaintiffs. But the notice of the rescission of the contract does not in terms forbid the delivery of the logs already cut on the rollways, and the plaintiff Johnson testified that he refused to so deliver them unless the notice was withdrawn, although the defendant told him to do so and he would pay for them; so that, even if the delivery of the logs on the rollways after the commencement of the action would entitle plaintiffs to recover therefor in this action, such delivery was not prevented by reason of the conduct of the defendant,

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and hence it was error prejudicial to the defendant to admit in evidence the written notice of the attempted rescission of the contract by him.

3. From the evidence it appears that plaintiffs had cut and delivered to defendant, during the months of November and December, 1890, about six hundred thousand feet of logs, upon which there was due, at the time the contract of the twenty-ninth of December was entered into, about one thousand four hundred dollars. After the December contract, defendant, from time to time, advanced and paid to plaintiffs divers sums of money upon orders drawn upon him by them, which the plaintiff Johnson testified were not drawn on any particular fund, until after March 8, 1891, but were applicable to either the November or December work, or the work done under the contract, and that "the payment of the one thousand eight hundred dollars [credited in the complaint] was by payments on our orders and accounts paid by defendant for us. I cannot give the items that were paid on this contract alone, as we had a running account, and he owed us for work done in November and December, 1890, prior to this contract." Witness then gave an itemized statement of the payments made after the first day of January, 1891, which amounted in the aggregate to two thousand one hundred and four dollars and sixty-six cents, and then says that "part of that amount was applicable to the November and December work; I do not know how much; there were payments also made in November and December, 1890, on the work of those two months." The defendant testified that the November and December work amounted to one thousand four hundred and seventy-three dollars, according to a settlement between him and the plaintiffs made on March 2, 1891, and that he advanced and paid to plaintiffs, on the November and December work, and on work done under the contract, from November, 1890, to May 1, 1891, a total sum of three thou-

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sand six hundred and ninty-one dollars and sixteen cents, giving a statement of the items, and that said items were paid on account, without particular application to either, and he also put in evidence the vouchers therefor. On motion of the plaintiffs the court withdrew from the jury all testimony in regard to payments not made on the contract in this action, and the checks, receipts, and orders relating thereto, for the reason, as the bill of exceptions states, "that it includes items paid on the November and December work, and that the payments proved should be confined to payments made on the contract." It appears from the testimony of both the plaintiffs and defendant that the payments were made on account, without special reference to the November and December work, or the work done under the contract, and that neither party was able to separate the amount applicable to either account, except by applying to the contract the balance remaining after paying for the November and December work, and under such a state of facts it seems to us to have been error for the court to undertake to withdraw from the consideration of the jury all testimony in regard to payments not made directly on the contract in this action, and confine the testimony to payments made on the contract, as such a rule would virtually deprive the defendant of all evidence of payments on the contract. The entire evidence, it seems to us, should have gone to the jury, with a direction to apply to the contract the balance remaining after payment for the November and December work.

4. The next and remaining alleged error is in the refusal of the court to give the following instructions: "By the terms of the contract the plaintiffs could not cull the timber, and if they cut the convenient timber to the neglect of the remote portions of the ground mentioned, they are responsible to the defendant in this action for such damages as defendant has shown by the proof he has sustained by reason thereof"; and, "by the terms of the con-

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tract the plaintiffs are not permitted to cut all the near timber, neglecting the remote until all the near timber is removed. The contract specifying three years as the time for completing the taking off of said timber, does not permit plaintiffs to postpone the cutting of all the remote timber until the last." Conceding these two instructions to have stated the law correctly, as an abstract proposition, it seems to us they were not applicable to any issues made by the pleadings in this case. The alleged breach of the contract, relied upon by defendant, as averred in the answer, is that "plaintiffs agreed by their said contract to cut all the sound fir, tamarack, and pine timber of a certain size on the ground cut over, and further not to cull the same, but that plaintiffs violated their said contract by culling and wasting said timber, leaving suitable saw logs in the tops left on the ground, by culling the trees easiest to get at, leaving those requiring more labor, and to so convert into suitable saw logs and deliver the same, as well as cutting and delivering a lot of unsound logs, wind-shaken and decayed in nearly twenty per cent of the lot, to defendant's damage of three hundred and fifty dollars, it requiring from fifty cents to a dollar a thousand feet more to utilize the timber left on the ground, and in inconvenient localities of the ground cut over than the contract price of plaintiffs." This allegation is not clear and distinct, and it is difficult to determine just what the pleader intended; but it seems that the more reasonable construction of the allegation is that the breach of the contract attempted to be assigned and relied upon is for culling the timber on the ground cut over, and leaving suitable timber thereon not cut into saw logs, and cutting and delivering a lot of unsound logs. It is not alleged that respondents had violated their contract by cutting all or any of the near timber to the neglect of the remote, or by cutting the convenient timber to the neglect of the remote portions of the ground to be cut over, and for these rea-

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sons, and upon this construction of the allegations of the answer, it seems to us that the instructions asked and refused attempted to present to the jury a question not made by the pleadings, and therefore were properly refused.

It follows that the judgment must be reversed and a new trial ordered. REVERSED.

[Decided June 29, 1893.]

RE ASSIGNMENT OF PENDLETON HARD- WARE CO.

[S. C. 33 Pac. Rep. 544.]

1. **ASSIGNMENT FOR CREDITORS—CORPORATIONS—ULTRA VIRES.**—The fact that a corporation was not by its articles authorized to deal in a certain kind of property, will not justify it in refusing to pay for the same on the ground that the purchase was *ultra vires*, where there is no special prohibition against the purchase, and the goods are retained. A general assignee is subject to the same duties and obligations as his assignor in this regard, and if he retains the property so purchased he must pay for it.
2. **CORPORATIONS—PROMISSORY NOTE—CLAIM AGAINST ASSIGNEE.**—A note, the execution of which was authorized by a corporation for the purpose of paying another note due by it, and used for that purpose, but which was inadvertently made by its officers without signing the name of the corporation thereto, and was taken up when due by certain of the signers, is a proper claim by such signers against the corporation and its assignee in insolvency.
3. **PROMISSORY NOTE—FICTITIOUS PAYEE.**—One who has furnished the actual consideration for, and is the holder of, a promissory note in terms payable to another, may treat such other person as a fictitious payee, and sue thereon as upon a note payable to bearer.
4. **INSOLVENT ESTATES—PRESENTATION OF CLAIMS.**—In presenting claims against insolvent estates no special form of pleading is required—it is enough to show an indebtedness from the insolvent, and, if questioned, the particulars of it can be shown. *Mitchell v. Powers*, 17 Or. 491, criticised on this point.

Umatilla County: MORTON D. CLIFFORD, Judge.

Chas. H. Carter, for objecting creditors.

Bailey & Balleray, for claimant creditors.

Opinion of the court—MOORE, J.

MR. JUSTICE MOORE delivered the opinion of the court:

This is a proceeding on the part of certain creditors, under section 3179 of Hill's Code, excepting to the claims presented against the estate of an insolvent debtor, and grows out of the following facts: The Pendleton Hardware & Implement Company, a private corporation, on February 6, 1891, made a general assignment for the benefit of its creditors; an assignee was appointed who duly qualified and published the required notice to creditors, who presented their claims against said estate, and among them were the following: Oregon Marble & Lime Company, for a balance on account for lime sold and delivered, four hundred and nine dollars; R. Sargent, B. Selling, J. M. Elgin, and M. J. Green, upon a note of five thousand dollars; and United States Investment Company, Limited, upon a note of six thousand dollars. The other creditors who had presented their claims against said estate excepted to the claim of the Oregon Marble & Lime Company for the reason that the insolvent debtor was incorporated for the purpose of operating a hardware and implement store, and could not deal in lime, and that the lime claimed to have been sold was a consignment for sale on account of the claimant; to the claim of R. Sargent *et al.* for the reason that said note was not given for moneys borrowed or used by the insolvent debtor, or on its account, or for its own use or benefit; and to the claim of the United States Investment Company, Limited, for the reason "that the note therein mentioned was executed and delivered without any authority, and that it does not appear that the same was executed and delivered for any debt of the insolvent company, or that any consideration was given therefor." These claimants answered the exceptions, to which the others replied, and the matter was then referred to T. G. Hailey, Esq., who took the testimony, and the court upon the hearing made an order disallowing the claim of the

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United States Investment Company, Limited, from which it appeals, and allowing the claims of the Oregon Marble & Lime Company and of R. Sargent *et al.* from which the other creditors appeal.

1. The testimony clearly shows that the lime was sold and delivered by the Oregon Marble & Lime Company to the insolvent debtor, and there is no dispute as to the amount due therefor. We do not think it necessary to pass upon the question whether the debtor could deal in lime, since the contract under which the Lime Company makes its claim had been fully executed, the lime had been delivered to and disposed of by the debtor, and the proceeds arising therefrom formed a part of its assets. The assignee holds the legal title to the property of the insolvent debtor and the fund arising from the sale thereof, for the payment of the just claims against the estate, and he can acquire no greater or better title than his assignor had; he is subject to the same duties and obligations with reference to the estate, and must pay, so far as he is able, any and all claims which could have been enforced against the debtor, if no assignment had been made. The test should be, could the claim, to which the exceptions are taken, have been enforced against the debtor. The sale of lime was not prohibited by the debtor's articles of incorporation, nor was it prohibited by statute. If no assignment had been made, the debtor could not have kept the lime and refused to pay for it because it was not hardware, nor could it keep the proceeds arising from the sale thereof. It must either return the goods or pay for them. "To say that it may retain the proceeds which have come into its possession, without making any compensation whatever to the person from whom it has obtained them, savors very much of an inducement to fraud." Green's Brice's Ultra Vires, 2 Am. Ed. 721. There would be no equity in a rule which would permit the creditors of an insolvent estate to reap the benefit of the assets derived from such a

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source and then plead that it was *ultra vires*. The debtor having received the benefit, the assignee, who stands in his place, should pay the claim as any other.

2. As the claim of R. Sargent *et al.*, the evidence shows that the insolvent debtor was incorporated with a capital stock of twenty thousand dollars, and that subscribers thereto gave their notes, amounting to twelve thousand dollars, in payment thereof; that on January 24, 1889, at a special meeting of the board of directors, a resolution was adopted which authorized the secretary to negotiate a loan not to exceed twelve thousand dollars, and the president and secretary were authorized to give the notes of the corporation and sign the same for the amounts desired, and also to deposit, as collateral security, the notes of the individual stockholders. In pursuance of this resolution, R. Sargent as president, and M. J. Green, as secretary, on September 30, 1889, borrowed from the Farmers' Savings Bank of Walla Walla, Washington, five thousand dollars, and gave the note of the corporation therefor, payable in three months; and to meet the payment of this note, one Simon Selling of Portland, Oregon, on February 20, 1890, loaned five thousand dollars, and the said president and secretary, with J. M. Elgin and B. Selling, directors of the corporation, signed a note therefor, payable in one year, but through inadvertence and mistake, omitted to sign the name of the corporation thereto. On February 21, 1890, the money received from Selling, on account of said loan, was deposited in the Pendleton National Bank of Pendleton, Oregon, and on the same day was, by check of the corporation, paid over to the Farmers' Savings Bank of Walla Walla, together with two hundred and fifteen dollars and sixty cents interest, and the note of that bank was surrendered to the insolvent debtor. When the Simon Selling note matured, R. Sargent, one of the joint makers, paid the same, and since that time B. Selling, another

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joint maker, has repaid Sargent one fourth thereof. This note was presented as a claim against the estate, to which the other creditors except for the reasons heretofore given. "The liability of a principal depends upon the facts, that the act was done in the exercise and within the limits of the power delegated, and especially that it was the intent of the parties that the principal, and not the agent, should be bound": *Angel and Ames, Corporations*, 294. That the money was borrowed from the Farmers' Savings Bank by the corporation in the exercise and within the limits of the power delegated, and that it was the debt of the corporation, cannot be questioned. The agents of the corporation, under the resolution, were also authorized to borrow the money from Selling to repay the loan from the Farmers' Savings Bank. The parties who joined in making the Selling note pledged their credit as security therefor as much as though their stock subscription notes had been deposited as collateral security, and the evidence shows that it was the intention of the parties that the corporation should be bound as principal. "Corporations may borrow money by their syndic, but if he borrows more than he had authority for, the community is not answerable for it unless the money come to their use": *Angel and Ames, Corporations*, 297. The resolution of the board of directors authorized the president and secretary to deposit the stock-subscription notes as collateral security, but Selling demanded the joint note, and as the amount of the loan went to the use of the corporation, it was a loan to it, and not to the joint makers. The evidence shows that the failure to sign the name of the corporation to the Selling note was an oversight on the part of the officers, and since equity will consider that done which was intended, it follows that the note was a joint one, with the corporation as principal and the other joint makers as sureties. The second objection to this claim, that it was given in payment of stock subscriptions, is not supported

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by the evidence, which conclusively shows that R. Sargent, who paid off the Selling note, had on August 1, 1889, fully paid his subscription to the capital stock of the corporation, and that he now owns three fourths and B. Selling one fourth of the Simon Selling note, which should be paid out of the assets of the estate.

3. The United States Investment Company, Limited, presented to the assignee the following claim:—

PENDLETON, Or., March 2, 1891.

Pendleton Hardware & Implement Company, to the United States Investment Company, Limited. To note dated December 7, 1890, three months, made by P. H. & I. Co. to U. S. I. Co., L., and interest to date, March 7, 1891, for money loaned at date of said note, \$6,150.00.

To this claim the objecting creditors interposed the exceptions heretofore stated. The claimant, to support its claim, introduced the following note:—

“\$6,000.

PORTLAND, Or., 15th Dec., 1890.

“Ninety days after date, without grace, for value received, in gold coin of the United States, we jointly and severally promise to pay to National Bank of Pendleton, or order, at the London & San Francisco Bank, Limited, in this city, the sum of six thousand dollars, with interest from date until paid at the rate of ten per cent per annum, payable monthly; both principal and interest payable in like gold coin. In case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

“THE PENDLETON HARDWARE & IMPLEMENT CO.

“BENJ. SELLING.

“JACOB FRAZER.

“JESSIE FAILING.

“M. J. GREEN.

“WATSON & LUHRZ.

“No. 1006.

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"Endorsements as follows: July 1. Memo. note made for interest to June 20, \$153.91; 12-31-91. Memo. note made for interest to 12-31-91, \$326.65."

The other creditors objected to this on the ground that it was irrelevant, incompetent, and immaterial. T. F. Rourke testified that the corporation borrowed six thousand dollars from the United States Investment Company for the purpose of paying a note of similar amount in favor of the National Bank of Pendleton which was given to the latter bank for money used in the insolvent debtor's business. We think the evidence clearly shows the authority of the parties to execute the note in behalf of the insolvent debtor, that it was for money used by the corporation in its business, and the question is presented whether the claimant, in the absence of an indorsement from the National Bank of Pendleton, can treat the latter bank as a fictitious payee and recover on the note against the makers as upon a note payable to bearer. "In the case of a note payable to a fictitious person, it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon a note payable to bearer": Daniel, *Negotiable Instruments* (4 Ed.), § 139. "When a note, however, is made payable to the name of some person not having any interest, and not intended to become a party in the transaction, whether a person of such name is or is not known to exist, the payee may be deemed fictitious. The name is assumed merely to give form to the instrument. In such case it has been adjudged that a recovery can be had on the money counts, by the actual creditor, where money passed between the parties in the action": *Foster v. Shattuck*, 2 N. H. 446. While the note was made payable to the National Bank of Pendleton, or order, the evidence conclusively shows that the United States Investment Company furnished the money which constituted the loan, and this fact would make it the equitable owner thereof. If the Pendleton National Bank had advanced

the money and then assigned the note without endorsement to the United States Investment Company, this fact would give it the equitable title thereto, but subject to any equities existing between the original payors and payee (Daniel, *Negotiable Instruments*, § 471), so that in either event the United States Investment Company was the equitable owner of the note and entitled to present the same as a claim against the estate, since no equities are attempted to be shown between the insolvent debtor and the Pendleton National Bank.

4. The objecting creditors contend that the claim of the United States Investment Company is not supported by the evidence. The original act, approved October 18, 1878, with some amendments, now constituting sections 3173, 3187, Hill's Code, was borrowed from Iowa, in which state it was held, under similar objections, that, "This being a special proceeding authorized by Code, section 2121, wherein no directions are found for pleadings, further than exceptions by creditors, and prescribing that therein the court shall proceed to hear the proofs of the parties, it is quite probable that no further pleadings are required": *In re Assignment of Guyer*, 69 Iowa, 585. Nor do we understand that this rule is changed by the opinion of THAYER, C. J., in *Mitchell v. Powers*, 17 Or. 491 (21 Pac. 451), in which he says: "The presentment of a claim in such a case requires more than a mere demand of a sum of money. A statement under oath of the debt or liability which is alleged to exist against the insolvent debtor should be made out and delivered or transmitted to the assignee. The creditor may not be required to state all the facts out of which the debt arose as fully as in the case of a confession of judgment; but he should set out sufficient facts to apprise the parties interested in the estate of the nature and consideration of the debt. If the debt is for money loaned or advanced, or goods sold, it should be stated, and the statement should not be limited to a specification of

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the evidence of it. Persons interested in an insolvent's estate have a right to know something more than the fact that the insolvent executed to the claimant his promissory note of a certain date; they should be informed with reasonable certainty what the consideration of the claim was." The United States Investment Company allege that their claim is "for money loaned at date of said note." Claims against the estate of an insolvent debtor should rest upon their justice, and not upon the sufficiency of their allegations; and if it appear that the claimant had at the instance of the debtor, performed labor, sold and delivered goods, loaned or advanced money, such claims, upon proof, should in equity be a charge against the estate. The decree of the court below will be modified and one here entered in accordance with this opinion. **MODIFIED.**

[Argued July 6, 1893; decided July 24, 1893.]

KANE v. RIPPEY.

[8. C. 33 Pac. Rep. 936.]

VENDOR AND PURCHASER — CONTRACT — ABSTRACT OF TITLE.—A purchaser of land under a contract by which the vendor agrees to furnish an abstract "showing a good and clear title free from defects" is entitled to recover back purchase money paid where the abstract furnished does not disclose a good title, although the title tested by the original record and conveyances and other facts not upon the face of the abstract is good and free from defects.

Jackson County: **W. C. HALE**, Judge.

Action by **E. C. Kane** against **C. G. Rippey** and **Frank Amy** to recover money paid on a contract for the sale of land. Judgment for plaintiff, and defendants appeal. Affirmed.

Paine P. Prim, for Appellants.

William M. Colvig, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is an action to recover money. The facts are, in substance, that the defendants made a contract with the plaintiff to sell him certain lands, and that they received five hundred dollars on the purchase price; that by the terms of the contract they were to furnish plaintiff with an abstract of title showing a good and clear title, free from defects, before he could make the next payment on the purchase price; that the defendants furnished an abstract, but not one showing a good title, free from defects; that the plaintiff tendered the defendants the balance of the purchase price, and demanded a compliance with their contract, which they failed and refused to do. On the trial the plaintiff offered in evidence the abstract of title which had been given to him by the defendants, and upon which he justifies his refusal to complete the purchase, claiming that it showed a defective title. The instruction of the court to the jury was to the effect that the abstract showed the title to be legally defective. The contention for the defendants is that the abstract showed a good title and one free from defects, and hence that the instruction was error.

This makes no less than three times that this case has been before us: *Kane v. Rippey*, 22 Or. 296 (23 Pac. 180), and 22 Or. 299 (29 Pac. 1005). On the first appeal the bill of exceptions disclosed the fact that when the plaintiff offered in evidence the abstract of title, the trial court refused to admit it on the ground that it was not the proper evidence of title, but that the records or original conveyances were the only legal proof of title admissible. In the course of its opinion this court said: "The plaintiff was endeavoring to show, not that the abstract conveyed title, but that the abstract of such title furnished the plaintiff by the defendants did not exhibit the 'good title,

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free from encumbrances,' that the defendants had agreed to convey. His position, in substance and effect, was that the defendants had agreed by their contract to assure him a good title, and to furnish him an abstract thereof from which its validity and marketable quality might be ascertained and determined, but that the abstract furnished him by them for this purpose, and which the plaintiff offered in evidence, and the court rejected, showed that the title was defective, or not such as would be in accordance with the terms of such contract." Whether or not the abstract disclosed such title as the defendant agreed to convey the court refused to determine, saying that "the abstract is not before us for that purpose, but only to show its object as applied to the contract," and then adds: "When, therefore, the abstract was offered in evidence, it was not for the purpose of proving title by the abstract, but of showing that the abstract furnished did not disclose evidence of such title as the defendants had agreed to convey. It results that we think the abstract was admissible for the purpose offered, and that it was error to exclude it." Hence the judgment was reversed and a new trial ordered.

When the case came on to be heard the second time, by consent of the parties the trial was had before the court and without the intervention of a jury. The abstract was admitted in evidence, and the court ruled that it did not disclose any legal defects, or, as we must take it, in the light of the former opinion, that the abstract showed a good fee simple title, free from incumbrances, such as the defendants agreed to convey. As a consequence the court found that the plaintiff was not entitled to recover in the action, and rendered judgment in favor of the defendants for their costs and disbursements, from which judgment the plaintiff again appealed. It thus appears that the ruling of the trial court which was relied upon as error on the second appeal presented the same question as the

Points decided.

instruction which is relied upon as error on this appeal. Nor do we understand that counsel controvert this proposition, but they claim that the court failed to pass upon it and hence the question is still open for decision. While, as a matter of fact, the court did determine that the abstract furnished did not disclose such title as the defendants had agreed to convey, the opinion does not directly so declare; yet it follows as a consequence and is so announced. It is, as the court says, "for that reason and because the findings of fact are defective that the judgment is reversed." The decision then, upon that point, is the law of the case, and is conclusive upon the parties and the court. It may be true that the title tested by the original record and conveyances and other facts not upon the face of the abstract is good and free from defects. It may be true that the curative acts will obviate the objections suggested, and the statute of limitations bar the uncanceled encumbrance, but these are matters which may involve litigation or judicial inquiry to determine the validity of title. The title, as disclosed by the abstract, is not the good title the defendants agreed to convey.

The judgment must be **AFFIRMED**.

[Decided July 5, 1893.]

ARCHER v. CALIFORNIA LUMBER CO.

[S. C. 33 Pac. Rep. 526.]

24	341
25	54
33*	526
34*	575
24	341
30	286
24	341
36	577

- 1. REFORMING OR CANCELLING CONTRACTS—FRAUD.**—The fact that one of the parties to a deed or contract was mistaken as to the legal effect of the instrument, or of the terms used, or that one of the parties was ignorant and illiterate, will not justify a reformation or cancellation of the document, but it must also appear that some relation of trust or confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties.
- 2. IDEM—FRAUD—PLEADING.**—A deed executed by an ignorant and illiterate person, in reliance upon the agents for the grantee, to whom he

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has entrusted the preparation of it, which does not express the real contract made between the parties, will be reformed in equity when it also appears that the grantor believed that the said agent was his attorney, and relied entirely on him to properly prepare the papers.

3. EVIDENCE NECESSARY TO REFORM A WRITTEN INSTRUMENT.—One who seeks to have a deed reformed on the ground that it was procured by fraud must establish his case by a clear preponderance of the evidence, but it need not be so conclusive as to leave no room for doubt.

Coos County: MARTIN L. PIPES, Judge.

Suit by Samuel Archer and Margaret, his wife, against the California Lumber Company for reformation of a deed. Decreed for complainants, and defendants appeal. Affirmed.

William R. Willis, for Appellant.

S. H. Hazard, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is a suit in equity to cancel or reform a written instrument which is fully set out in the complaint. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit, which the court overruled, and thereupon the defendant answered, denying all the material allegations of the complaint, except that it gave its obligation for a certain sum as specified, and alleged that the only agreement made between the plaintiffs and defendant is the one set forth in the complaint, etc. The case was referred, the testimony taken, and the court decreed that the contract set out should be reformed, etc.

1. The first objection is that the court erred in overruling the demurrer. The ground of this objection is that the facts alleged only show a mistake by the plaintiffs as to the legal effect or import of the agreement which they executed. This, it is claimed, is not a ground for either defensive or affirmative relief, without some allegation of

fraud, misrepresentation, violation of confidence reposed, or of other inequitable conduct in the transaction. It is perhaps true that the allegation that the plaintiffs are ignorant and illiterate persons, and did not understand the meaning and import of the language used in the contract, is not sufficient, of itself, to entitle them to the cancellation or reformation of the contract. They are doubtless bound to exercise care and diligence in their business transactions, and if they were incapable, from illiteracy, of examining the instrument and determining its import, they ought, before signing it, to have procured some one in whom they had a right to place confidence, to examine it for them. Such allegation does not show any inequitable conduct in the transaction sufficient to authorize the court to grant the relief prayed for, unless it also appears from the complaint that some relation of trust or confidence existed between the parties to the contract, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties. "The rule is well settled," as stated by Mr. Pomeroy, "that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning or effect of the whole or any part of its provisions": 2 Pomeroy, Equity Jurisprudence, § 843.

2. The complainant, after alleging, among other things, that D. H. Bibb was agent of the defendant company, and that John A. Gray was its attorney, of which

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the plaintiffs had no knowledge, charges "that at the time the writings were executed by the plaintiffs they had implicit confidence in the said D. H. Bibb and John A. Gray, and honestly believed that the said Gray was acting as their attorney, as before stated, and that he would not have advised plaintiffs that the writings were all right unless they had been in accordance with the actual verbal agreement which the plaintiff Samuel Archer made with the defendant as aforesaid, and that plaintiffs did so honestly believe, or they would have refused to have executed such writings," etc. "That at the time the writings were executed the defendant well knew that the deed executed by the plaintiffs was not in accordance with the actual agreement which was made and entered into between the plaintiffs and the defendant, but the defendant fraudulently caused the deed to be drawn in the form in which it was drawn for the purpose and with the intention of obtaining an advantage over the plaintiffs, and with the same purpose induced the plaintiffs to execute the same as aforesaid." Without further comment, we think these facts, taken in connection with the other allegations referred to in the succeeding paragraph, make it sufficiently appear from the complaint that the facts stated constitute a cause of suit which entitles the plaintiffs to relief, within the rule announced by the authorities cited.

3. The next objection is that the evidence for plaintiffs is not sufficient to entitle them to a decree. In cases of this character the plaintiff should make the better case upon the issue, and satisfy the mind of the court as to the mistake or fraud charged. The evidence should preponderate in his favor to entitle him to relief. "The party who alleges fraud," says Mr. Bigelow, "must make good his allegation by clear and satisfactory evidence, such as will preponderate over presumption of evidence on the other side": Bigelow, *Fraud*, § 3, p. 142. The law does not require more. The evidence need not be "conclusive"

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and leave no doubt, but it ought to be so clear and satisfactory as to preponderate. The evidence shows that the plaintiffs entrusted D. H. Bibb, with whom the agreement was made on behalf of the defendants, to take away the written memorandum made at plaintiffs' house for the purpose of preparing an agreement in accordance with the terms actually made. It further shows that the plaintiffs reposed confidence in Bibb and Gray, and that the plaintiff S. Archer supposed that Gray, who was attorney for the defendant, was acting as their attorney and would protect their interests. There is other evidence on this subject, but we do not deem it necessary to recur to it. To justify its decree, the court necessarily found from the evidence that the terms inserted in the agreement were not in accordance with the actual agreement which had been made between the parties, and that the plaintiffs, induced by the confidence reposed, signed the agreement so prepared without explanation, or understanding the legal import of the instrument. We think the evidence justifies the conclusion reached, and the decree entered therein was proper. When one party to a contract entrusts to and depends upon the other party to have the contract as made by them reduced to writing, the party entrusted with such duty must act with the utmost good faith; and if the contract as written is not the one which was verbally agreed upon, and the party was induced by the confidence reposed in the other to execute the contract as written, believing it expressed the real contract made, equity will not permit it to stand.

The result of our examination convinces us that there was no error and that the decree must be **AFFIRMED**.

Statement of the case.

[Argued July 13, 1893; decided July 31, 1893.]

GOODALE v. COFFEE.

[S. C. 33 Pac. Rep. 900.]

1. PUBLICATION OF SUMMONS—RECITALS IN ORDER—CODE, § 56.—The affidavit for publication of a summons must show the existence of all the jurisdictional facts required by statute, but the order for publication need not contain any recitals of fact whatever, and if it does contain any they are merely surplusage,—the order is only the conclusion of the court based upon the affidavit. Jurisdiction in cases of published summons is based upon the affidavit, and not on the recitals of fact found in the order.
2. SUFFICIENCY OF SUMMONS—NAMES OF PARTIES IN PUBLISHED SUMMONS—CODE, § 56—AMENDMENT.—Where, in a suit to foreclose a mechanic's lien, only the property owners are made defendants in the complaint, and afterwards, by stipulation with the plaintiff, other lien claimants appear and file answers setting up their respective liens, but do not serve any summons, the filing of such answers does not constitute an amendment of the complaint in any respect, and the published summons is sufficient under Hill's Code, § 56, requiring a published summons to contain the title of the cause, though it does not name any of the intervening lien claimants as parties.

Marion County: REUBEN P. BOISE, Judge.

This is a suit by Goodale & Wheeler against Coffee, Cragin & Stubbings, who are claimed to be partners, to foreclose a lien for material furnished and used in the construction of a dwelling-house situate upon lot ten of block twenty-six in Highland Addition to the City of Salem, Marion County, Oregon. The facts show that plaintiffs furnished material of the value of one hundred and eleven dollars to the defendants Coffee, Cragin & Stubbings, which was used in the construction of said building, and to secure the payment of said sum the plaintiffs, on August 27, 1891, prepared and filed with the county clerk of said county of said county their notice of lien; that on the twenty-ninth of August other liens were filed against the same property as follows: E. E. Snow, fifty-four dollars; the Oregon Land Company, one hundred and fifty-three dol-

24	346
28	404
24	346
34	537
24	346
48	550

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lars; Ira Erb, eighty-four dollars, and R. M. Wade & Co., twelve dollars; that on January 26, 1892, plaintiffs commenced this suit against the defendants Coffee, Cragin & Stubbings to foreclose their lien, and issued a summons and placed it in the hands of the sheriff of said county for service, who, on the thirtieth of said month, made a return thereon that he could not, after diligent search and inquiry, find either of said defendants within said county and state; that on the day last mentioned a stipulation was entered into between the plaintiffs and E. E. Snow, the Oregon Land Company, Ira Erb, and R. M. Wade & Co., whereby it was agreed that they might intervene and file answers to plaintiffs' complaint, and that said suit might proceed to final determination with them added as parties thereto, and on said day the said lien-holders filed their separate answers, in which their respective claims were set out, but served no summons upon Coffee, Cragin & Stubbings; that on February 6, 1892 (some days after the answers of the other lien claimants had been filed under the stipulation), the plaintiffs filed an affidavit for an order directing the service of a summons by publication, and on the eighth of said month the judge granted the same. The summons published in pursuance of said order contained the names of the defendants Coffee, Cragin & Stubbings only, and the first publication thereof appeared in the designated newspaper in the issue of the twelfth of February, and weekly thereafter for six consecutive weeks. On June 14, 1892, the defendants Coffee, Cragin & Stubbings having made default, a decree was entered against them in favor of plaintiffs upon the said service, but no decree was rendered in favor of either of the other lien-holders. The next day the defendants Coffee, Cragin & Stubbings moved to set the decree aside for the reason that the court had no jurisdiction over them, and that no proper or legal service of the summons had ever been made. This motion was overruled by the court, from which the defendants appeal. Affirmed.

Argument of counsel.

Robert G. Morrow, for Appellants.

1. The first objection is that the judge did not find or declare the existence of a number of facts which the statute requires to exist before a service can be made by publication. The publication must have been made under the first part of section 56 and subdivision 3 thereof, viz.: Personal service of summons could not be made in Oregon and a cause of action existed against defendants, and the defendants were not residents of Oregon, but had property therein, and the court had jurisdiction of the subject of the action. We insist that the order is insufficient against a direct attack, because the judge in that order does not declare that the defendants, or any of them, had any property within this state, or are proper parties to an action relating to real estate, or that the court had jurisdiction of the action.

We claim that it is necessary to have an adjudication of the existence of the facts requisite to a publication of the summons, and that the existence of these facts must affirmatively appear in the order. If the judge had simply made a general statement in his order that this was a proper case for the publication of summons, it would be presumed that he found the existence of every necessary fact; but when he begins to make findings on the different facts, he must find affirmatively the existence of every fact necessary to sustain his action, or the order is insufficient. The rule that the mention of one is the exclusion of all others is peculiarly applicable in this instance. The judge is under no obligation to believe everything in the affidavit for publication; it may be contradicted by other matters in the record, or the judge may himself know facts that disprove some of the requirements for publication. It is a well-established rule that the affidavit for publication must contain some probative facts on which the judicial mind may act—something from which a con-

Argument of counsel.

clusion may be drawn (*McDonald v. Cooper*, 32 Fed. Rep. 748, and authorities cited); and the only way we can know that the court believed as the result of his examination is what he enters in the order. The order directing summons to be, or not to be, published is the record of what the court finds the facts to be, and must of necessity be conclusive. It surely cannot be presumed that the court found other facts which he did not record—this tribunal has several times announced that there are no presumptions in these cases. Nothing “appears” to the court except what it includes in its order. If this is not true, then where will the end be? We shall be overrun with oral and affidavit testimony of what “appeared” to the trial court whenever a service by publication is attacked. This rule was successfully invoked in the recent case of *Beekman v. Hamlin*, where the trial court enumerated several, but not all, the circumstances that would tend to show the non-payment of a judgment, and this court held that an instruction should have been given sufficiently broad to include all the circumstances: 23 Or. 313.

2. A second objection to this judgment is that the published summons does not contain either the names of all the defendants or a sufficient statement of the relief demanded: Code, p. 182. The four lien-claiming defendants became parties to the case on the thirtieth of January, 1892, and no steps whatever were taken towards publication for several days, viz.: until the eighth of February. The published summons entirely omits Ira Erb, R. M. Wade & Co., C. E. Snow, and the Oregon Land Company, though they were parties to the suit, and had already filed their answers claiming foreclosures of their respective liens. Four parties defendant were entirely left out in stating the title of the cause, and no intimation is anywhere given in the published summons that they have the slightest interest in the litigation, although the record shows that they had been for some time parties to the

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cause and claiming liens to a large amount. It is true that the original complaint did not allege the interest of these intervening defendants, but by stipulating that they are proper parties, the plaintiffs amended their complaint. After the filing of this stipulation of the thirtieth of January, it became a complaint for the determination of the rights of all the parties, and the published summons should have so stated.

The statute, at page 182, § 56, carefully requires a published summons to contain the name of the court, the title of the cause, etc., and all the provisions of the statute must be strictly complied with. The requirements of our statute are rather unusual, but the same provision has been passed upon in other states holding that a summons must contain the name of every party to the action: *Anderson v. Brown*, 16 Tex. 554; *Battle v. Eddy*, 31 Tex. 369; *Rodgers v. Green*, 33 Tex. 663; *Portwood v. Wilson*, 33 Tex. 713; *Heath v. Traley*, 50 Tex. 209; *Lyman v. Milton*, 44 Cal. 630; also *Durham v. Betterton*, 79 Tex. 223 (14 S. W. 1060), where the published summons did not contain the file number as required by statute, and the case was reversed. Here the property owners, who resided in Chicago, could not have any knowledge of the suit other than that given by the published summons, which stated that the defendants were Coffee, Cragin & Stubbings. In fact, there were four other defendants, each of whom had filed a cross-complaint against the defendants Coffee, Cragin & Stubbings, and was asking affirmative relief. If their names had appeared, it would have been a suggestion at least, and Coffee *et al.* might have investigated, but neither in the title nor in the statement of the relief demanded is there any suggestion that the lien claimants are parties to the suit.

William M. Kaiser (*Tilmon Ford* on the brief), for Respondents.

Argument of counsel.

1. The sufficiency of the affidavit for publication of the summons is not questioned by the appellant, but they contend that the order for publication found therein is not sufficient. Section 57, Hill's Code, provides what an order for publication must contain, and we submit to the court that the order in this case contains all that is required by said section of the law. And, even if it were required by the said section for the court to find the facts upon which the order is based, the order in this case would be sufficient, because it finds sufficient facts to authorize the granting of the order for publication of the summons, as the court will observe from an examination of the affidavit, and the order for the publication of the summons in this case, because the court found that the defendants were necessary and proper parties defendant in said suit.

In construing an order for the publication of a summons to an absent defendant, the court will consider the affidavit and complaint. In the case of *Knapp v. King*, 6 Or. 248, BOISE, J., decides this question in the following language: "The affidavit on which the order was based is not exhibited, and we are not advised of its contents. It is claimed that the order must set out enough to show a case giving the court jurisdiction to make it. If an objection had been made to this record of the judgment when offered in evidence, that this order was not sufficient, as it did not appear affirmatively that the justice had authority to make the order, the parties offering it might have produced the affidavit, and for aught that it appears it was before the court, and as it is not here we must presume that it was sufficient to authorize the order for publication. The only question is, must the order itself recite facts which give the court authority to make it? We think the rule is that in determining the validity of the order, the court may look at the affidavit and the complaint, and in the absence of any proof to the contrary, the court will presume they were sufficient."

Argument of counsel.

2. The appellants object to the decree, because the summons does not contain the names of the alleged parties, Ira Erb, R. M. Wade & Co., C. E. Snow, and the Oregon Land Company. In answer to this objection, the respondents contend that it was unnecessary, and would have been improper to have placed their names in the summons for the following reasons: *First*, there was no amendment of the complaint, as claimed by appellants, as the stipulation referred to, by which said parties were allowed to file their answers, was nothing more than an attempted intervention, which is defined to be "the act by which a third party becomes a party in a suit pending between other persons": 1 Bouvier's Law Dictionary, 744; Pomeroy, Remedies and Rights, § 430. *Second*, the said alleged subsequent lien claimants did not become parties to the suit by their attempted intervention, because they did not ask for any service of their answers upon the defendants, Coffee, Cragin & Stubbings, nor did they make any service or citation thereof whatsoever, nor did they make any attempt to foreclose their alleged liens; and the record shows that if they ever had liens against the property described in the complaint, they were barred by the statute at the time the decree was taken: 2 Hill's Code, § 3675; *Chinn & Boyd v. Thomas Ong*, 33 La. An. 703; *Coggan v. Reeves*, 3 Or. 275; Pomeroy, Remedies and Rights, §§ 429, 430. *Third*, the said Ira Erb, R. M. Wade & Co., C. E. Snow, and Oregon Land Company, were not necessary or proper parties to said suits, for the reason that their answers do not show that they had any liens against the said property, inasmuch as they failed to show that they had filed their liens, if they ever had any, within the time required by law, or that they filed any claim containing a true statement of their demands, after deducting all just credits and offsets, with the name of the owner or reputed owner, as required by 2 Hill's Code, § 3673.

To entitle a person to intervene, he must by averment

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show that his rights are involved in the cause which is being litigated, and that he is entitled to the relief which he asks: *Pomeroy, Remedies and Rights*, §§ 429, 430; *Smith v. Allen*, 28 Tex. 497, *Pool v. Sanford*, 52 Tex. 621.

MR. JUSTICE MOORE delivered the opinion of the court:

The appellants contend:—*First*, that the order for the publication of the summons is insufficient, and, *second*, the summons did not contain the names of the parties to the suit.

The theory once prevailed that judgments *in personam* against a non-resident, based upon constructive service of process upon him, and without his appearance, would support a sale of the debtor's property situate in the state where rendered, but in *Pennoyer v. Neff*, 95 U. S. 727, it was held that when the suit is merely *in personam*, constructive service by the publication of a summons upon a non-resident is ineffectual for any purpose, and that unless the court, at the inception of the proceedings, got jurisdiction of the defendant's property by attachment, or some other equivalent act, so as to make the proceeding *quasi in rem*, no judgment rendered against a non-resident upon such service would have any force or effect. When the court gets jurisdiction of the defendant's property, it may order the service of process by publication, upon the theory that such property is always in the possession of the owner, in person or by agent, and its seizure must necessarily inform him of the nature of the proceedings, and thus give the court jurisdiction to deal with it. The subject of the action may be the recovery of money, and since the debtor's property within a state should be liable to the citizens thereof for the payment of his debts, it follows that the subject of the action carries with it the property which has by attachment or other lien become an incident thereto. The process may be constructively served whenever the court has jurisdiction of the defendant's

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property, either in a direct proceeding to divest him of his title, or where such property has by any lien thereon become the incident of any judicial proceeding. Judgments rendered upon such service are *quasi in rem*, and only attach to property of which the court had jurisdiction at the time the service of process was ordered. It is well settled that statutes which provide for the service of process by publication are in derogation of the common law, and must be strictly construed: *Odell v. Campbell*, 9 Or. 298. The affidavit is the complaint upon which the judgment order for service is based, and must state every jurisdictional fact required by the statutes: *McMillen v. Reynolds*, 11 Cal. 372. If the affidavit be insufficient, the court acquires no jurisdiction over the defendant, and the judgment is void: *Brady v. Seaman*, 30 Cal. 610.

1. Section 56, Hill's Code, so far as it applies to the case at bar, provides that when service of the summons cannot be had as prescribed in the preceding section, it may, by order of the court or judge, be served by publication, when the defendant is not a resident of the state, but has property therein, and cannot after due diligence, be found within the state, and that fact appears to the satisfaction of said court or judge, and it also appears that a cause of action exists against the defendant, and that the court has jurisdiction of the subject of the action. Plaintiff's affidavit for such order shows when the complaint was filed, and the nature and object of the suit; that the defendants resided out of this state, and could not after due diligence be found therein, and the means adopted to ascertain said fact, and to discover their residence and postoffice address, which are given; that the suit relates to real property in this state, which is properly described; that they are proper parties thereto, and that copies of the complaint and lien were attached to and made a part thereof. The judge, upon presentation of said affidavit, made an order which, in substance, recites that it satisfac-

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torily appeared therefrom that neither of said defendants could after due and diligent search and inquiry be found in the state of Oregon; that they reside out of said state; that a cause of suit existed in favor of plaintiffs against the said defendants; that personal service of the summons could not be made upon them, and directed the time and manner of the service by publication; but said order contained no finding that the defendants had any property within the state, or that the court had jurisdiction of the subject of the suit. The affidavit states all the probative facts necessary to justify the court in being satisfied of the existence of the ultimate facts required by the statute. Copies of the complaint and lien are made parts of the affidavit, and from each a correct description of the real property sought to be affected by the foreclosure of the lien can be ascertained. The complaint may be read with the affidavit, when made a part of it, for the purpose of aiding the latter: *McDonald v. Cooper*, 32 Fed. Rep. 745. All that the statute requires from the court or judge, upon the presentation of the affidavit, if the jurisdictional facts satisfactorily appear therefrom, is to make an order, properly dated, that the publication be made in a particular manner for a reasonable time, and a direction that a copy of the summons and complaint be forthwith deposited in the postoffice, directed to the defendant, at his place of residence, if known: Hill's Code, § 57. The affidavit must state the jurisdictional facts, and the order of the court or judge is the conclusion reached from such statements. Jurisdiction is based upon the affidavit, and not on the recitals of fact found in the order. If the judge had made findings which were not supported by the affidavit, and issued the order for publication upon such findings, the service of process would have been voidable. The affidavit in this case stated all the facts necessary to give the court or judge jurisdiction, and the order based thereon is sufficient without any recitals. When the order has

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been granted it must be presumed that the jurisdictional facts have been established, but if they do not appear in the affidavit, this presumption is overcome, and the order thereby rendered void. When plaintiffs, under the provisions of section 3673, Hill's Code, filed their lien, it attached to the property therein described, and this description having been copied into the affidavit the court obtained jurisdiction thereof, and the decree obtained under said service of summons by publication bound all said property.

2. Section 3677, Hill's Code, provides that all lienholders whose claims have been filed for record shall be made parties to a suit to foreclose the lien of any of them. The record shows that on the twenty-ninth day of August, 1891, E. E. Snow, Ira Erb, the Oregon Land Company, and R. M. Wade & Co., filed claims with the clerk of said county for material furnished by each and used in the building upon which plaintiffs' claimed their lien, and thus became proper parties to the suit, and when the stipulation was entered into that they might intervene therein, it was a recognition of their rights. When they filed their separate answers they did not thereby amend plaintiffs' complaint, since it could not be amended by stipulation unless the defendants Coffee, Cragin & Stubbings had joined therein. Plaintiffs had the right to amend, but this could not be done except by filing and serving a copy of the amended pleading upon the adverse parties (Hill's Code, § 99), and they not having exercised such right, there was no amendment. If it were admitted that the stipulation and answers amended the complaint and brought in new parties, then the summons which was served would be ineffectual to give the court jurisdiction; but the complaint not having been amended by the stipulation and answers, the summons contained the statutory requirements necessary to give the court jurisdiction.

The manifest object of the statute which requires a

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plaintiff in foreclosing his lien to make all lien-holders parties is to save to the owners of the property all the expense possible. This object, so far as the defendants Coffee, Cragin & Stubbings are concerned, was accomplished, since the lien-holders who came in by stipulation failed to serve a summons upon them; and, the statute having run against their claims, the defendants have not only saved the costs and disbursements they would otherwise be liable for, but have also been relieved from the liens upon their property. The decree is AFFIRMED.

[Argued June 5, 1893; decided July 17, 1893.]

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COOPER v. PHIPPS.

[S. C. 33 Pac. Rep. 985; 22 L. R. A. 836.]

1. **LIBEL AND SLANDER—EVIDENCE OF PLAINTIFF'S CHARACTER.**—In actions for libel and slander, the good character of the plaintiff cannot be shown until it has been attacked.
2. **LIBEL AND SLANDER—PRIVILEGED STATEMENTS OF WITNESSES*—MALICE—BURDEN OF PROOF.**—Statements uttered or published by witnesses in the course of judicial proceedings are presumptively privileged, and before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and were not in response to questions asked by counsel.

Jackson County: W. C. HALE, Judge.

This appeal is brought to reverse a judgment for five thousand dollars recovered by Emma Cooper in an action

* NOTE.—This case is re-reported in 22 L. R. A. 836, with an excellent review of the authorities on the question of the privilege of witnesses as to defamatory testimony. See also *Hunkel v. Voneiff*, 69 Md. 179 (9 Am. St. Rep. 413), where the authorities supporting the English view of the privilege of witnesses are collated, discussed, and followed. In *Shadden v. McElwee*, 86 Tenn. 146 (6 Am. St. Rep. 821), the American rule is followed. The kindred question of libel by defamatory words in a pleading is fully discussed in a note to the Louisiana case of *Randall v. Hamilton*, 45 La. Ann.; S. C. 22 L. R. A. 649.—REPORTER.

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for libel against Calista Phipps and her son, Wm. Phipps. It is charged that in a certain suit for divorce and for the custody of a minor child, pending in the superior court for the county of San Francisco, state of California, between the defendant William Phipps, as plaintiff, and Minnie Phipps, a sister of the plaintiff herein, as defendant, Calista Phipps, one of the defendants herein and mother of her co-defendant Wm. Phipps, was called and testified as a witness, and in response to the following interrogatory of counsel, "Has the defendant been in the habit of running around with other men?" answered, "Yes, sir; two young men came and rented a house and she and her sister [meaning this plaintiff], lived with them, and kept house for them; did this about two months; all the neighbors talked about their scandalous conduct;" that this testimony was reduced to writing by the court commissioner, and was duly filed, at the instance of the defendant William Phipps, and became a part of the records and files of said court; that defendant meant by said words to accuse the plaintiff of being an unchaste woman, and of having lived in notorious lewd and lascivious cohabitation with some man to plaintiff unknown; that such statement was false, malicious, and defamatory, and was made with malice, and with the intent to defame the plaintiff, and at the instigation and request of the defendant William Phipps. The answer admits that the defendant Calista Phipps testified as alleged in the divorce suit, but denies the other allegations of the complaint, and affirmatively alleges that such testimony was given with a firm belief in its truth, in answer to an interrogatory propounded to her by counsel, and without malice or ill will toward plaintiff herein, and that such testimony was relevant to the issue involved in said suit. Reversed.

William M. Colvig, and P. P. Prim, for Appellants.

1. It was error to allow plaintiff to prove that her general reputation for virtue and chastity was good, as

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this was done before any attack was made on her reputation. The law presumes the character and public reputation of the plaintiff to be good, and of the best, until it is attacked, and she can safely rest upon that presumption. Without introducing any evidence, her reputation and character stood without qualification or defect, and no evidence that she could offer could add to or increase its force and virtue: *Hitchcock v. Moore*, 70 Mich. 112; *Cornwall v. Richardson*, Ryan & M. 305; *Matthews v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325 (8 Am. Dec. 189); *Bamfield v. Massey*, 1 Campb. 460; *Dodd v. Norris*, 3 Campb. 519; *Houghtaling v. Kelderhouse*, 2 Barb. 149; Newell, Defamation, Slander and Libel, p. 823; *Gough v. St. John*, 16 Wend. 646; *Anderson v. Long*, 10 Serg. & R. 55; 1 Wharton, Evidence, 2d Ed. §§ 47-50; *Miles v. Vanhorn*, 17 Ind. 245 (79 Am. Dec. 477); *McCabe v. Platter*, 6 Blackf. 405; *Howard v. Patrick*, 43 Mich. 121; *Fahey v. Crotty*, 63 Mich. 383; *Lotto v. Davenport*, 50 Minn. 99; *Croasdale v. Bright*, 6 Houst. (Del.) 52.

2. Under the allegations of plaintiff's complaint, it is shown therein that Calista Phipps was conditionally privileged when she uttered and published the alleged libel, and the plaintiff could not recover any damages in this case, unless the plaintiff could show by a preponderance of the evidence that Calista Phipps was actuated by actual malice, or malice in fact against plaintiff: *Kent v. Bougartz*, 15 R. I. 72. The rule of evidence as to such cases is to impose on the plaintiff the *onus* of rebutting those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice that is malice in fact, as the true motive of his conduct: Townshend, Slander and Libel, 4th Ed. § 209, p. 296; *King v. Root*, 4 Wend. 113 (21 Am. Dec. 109). Under the pleadings, the plaintiff was not entitled to recover at all, without proving that the words were uttered and published with actual

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malice against said plaintiff. *Hastings v. Lusk*, 22 Wend. 410 (34 Am. Dec. 330); *Townshend, Slander and Libel*, p. 296, § 209; *Cooke, Defamation*, 28, 31, 60; *Newell, Defamation, Slander and Libel*, p. 324, § 23; *Starkie, Slander and Libel*, 229, 292; see *Folkard's Starkie, Slander and Libel*, p. 262, note 6 *Lawson v. Hicks*, 38 Ala. 279 (81 Am. 49); *Calkins v. Sumner*, 13 Wis. 193 (80 Am. Dec. 738); *Dec. Faris v. Starke*, 9 Dana, 128 (33 Am. Dec. 538), *King v. Root*, 4 Wend. 113 (21 Am. Dec. 109).

3. Said words are not libelous *per se* or upon their face, because they are ambiguous and uncertain as to their meaning. But it is alleged in the complaint that she meant and intended to be understood as meaning by the use of said words that plaintiff was not a virtuous woman; that her public reputation for chastity and virtue was bad, and that plaintiff at some time had been guilty of living in notorious, lewd, and lascivious cohabitation with some man to plaintiff unknown. The complaint contains no averment that the persons to whom it is alleged that the publication of said words was made, understood the libelous meaning intended to be conveyed by the utterance and publication of said words as charged in the complaint. Such an allegation was material and absolutely necessary in this complaint. The rule is well established that where the words complained of are not libelous *per se*, on account of being ambiguous and doubtful as to their meaning, that it is absolutely essential and necessary to aver in the complaint that the persons, to whom it is alleged the publication was made, understood the libelous meaning of said published words, as intended by the publisher thereof, and as charged in the complaint; because, if not so understood by the readers of said publication, no injury could result to the plaintiff in consequence of the publication: *Maynard v. E. F. Ins. Co.* 34 Cal. 48, and 47 Cal. 207; *Harris v. Zanam*, 93 Cal. 59; *Woodsworth v. Meadows*, 5 East, 453; *Goodrich v. Woolcott*, 6 Cow. 239, *Andrews v.*

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Woodmensee, 15 Wend. 234; *Gibson v. Williams*, 4 Wend. 320, *Glatz v. Kleen*, 50 N. W. Rep. 137; *Irebeck v. Beerle*, 50 N. W. Rep. 36; *Hunckel v. Vonliff*, 14 Atl. Rep. 500; *Townshend, Slander and Libel*, §§ 108, 96.

Lionel R. Webster, and *Francis Fitch*, for Respondent.

1. In slander and libel, charging plaintiff with being unchaste, she may prove on her direct case that her general reputation for chastity and virtue is good: (1) to support the presumption that it is good, (2) cases of slander and libel are exceptions to the general rule forbidding such proof in civil actions, and (3) to enhance damages: 3 *Sutherland, Damages*, p. 665; 2 *Greenleaf, Evidence*, § 275; 1 *Wharton, Evidence*, 3d Ed. §§ 47, 50; 1 *Sedgwick, Damages*, 8th Ed. § 52, 2 *Sedgwick, Damages*, 8th Ed. §§ 445, 452; 3 *Am. & Eng. Enc.* 112, and note; *O'Bryan v. O'Bryan*, 13 Mo. 16 (53 Am. Dec. 128); *Williams v. Haig*, 3 Rich. L. 362 (45 Am. Dec. 774); *Adams v. Lawson*, 17 Gratt. 250 (94 Am. Dec. 455); *Stone v. Varney*, 7 Met. 86 (39 Am. Dec. 762). Actual ill will or malice will enhance the damages, but need not be shown to entitle plaintiff to recover: 3 *Sutherland, Damages*, p. 642; *Hill's Code*, § 2029.

2. A witness testifying in a court who maliciously defames another with the intent to injure the reputation of such other, or expose him or her to public hatred, contempt, or ridicule, if such testimony is false and its falsity is known by the witness, is not protected from civil action for libel because of the privilege of witness: *Townshend, Slander and Libel*, § 223; *Shadden v. McElwee*, 86 Tenn. 146; *Hutchinson v. Lewis*, 75 Ind. 55; 1 *Hilliard, Torts*, 322; *Cooley, Torts*, 210; *Nelson v. Robe*, 6 Blackf. 204; *Grove v. Brandenburg*, 7 Blackf. 234; *Mower v. Watson*, 11 Vt. 536 (34 Am. Dec. 704). The American rule modifies that enforced in England: *White v. Carroll*, 42 N. Y. 161

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(1 Am. Rep. 505); *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442.

3. Defendants are presumed to have used the words in the meaning in which they would ordinarily be accepted and understood, under the circumstances and in the connection in which they were used. If under these conditions the words would convey to a person of ordinary understanding the charge of unchastity, such meaning must be accepted: Townshend, Slander and Libel, p. 144, §§ 140, note 1, 144, 282, 384, 391; *Wilcox v. Moon*, 63 Vt. 481; 13 Am. & Eng. Enc. Law, 379, 381; *Kedrolivansky v. Niebaum*, 70 Cal. 216; *Davis v. Sladden*, 17 Or. 259; *Proctor v. Owens*, 18 Ind. 21 (81 Am. Dec. 341); *Goodrich v. Hooper*, 97 Mass. 1 (93 Am. Dec. 50); *Stallings v. Newman*, 26 Ala. 300 (62 Am. Dec. 723); *Little v. Barlow*, 26 Ga. 423 (71 Am. Dec. 219).

MR. JUSTICE BEAN delivered the opinion of the court:

1. The first assignment of error necessary for us to consider is that as a part of plaintiff's case in chief, evidence in her behalf was admitted tending to show that her general reputation for virtue and chastity was good. At the time this evidence was offered and admitted, no attack had been made by defendants, either in the pleadings or otherwise, upon the character of the plaintiff; and it was then and there stated by their counsel, in open court, and in the hearing of the jury, that her reputation for virtue and chastity was admitted to be of the best, and that no attack would be made thereon during the trial, nor was any such attack made. There is some conflict in the authorities as to whether, in an action for libel or slander, the plaintiff may give in evidence his good character, without it first having been attacked by the defendant either in the pleadings or evidence. "But the better opinion," says Mr. Wharton, "is against this concession, on the ground that the law presumes a party's character

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good, and that it is superfluous for him to prove that which is presumed": Wharton, Evidence, § 47. And again the same author says: "It would be manifestly improper to permit a party suing for damages to put in evidence, as reason why he should have heavy damages, that his character is good because, *first*, the law assumes all characters to be good, and there is no use in proving that which is thus assumed; *secondly*, to make good character the basis of recovery, would be equivalent to saying that a person with a bad character can be injured with impunity; *thirdly*, a collateral issue would be provoked which would bear hard upon many deserving cases. For these and other reasons the courts have refused to permit such evidence to be put in": *Idem*, § 50. This we think the better doctrine, and the one supported by the weight of authority. The law presumes the plaintiff's character to be good until it is attacked, and she may safely rest upon this presumption, and no evidence that she may offer can add to or increase its force or virtue. See *Hitchcock v. Moore*, 70 Mich. 112 (14 Am. St. 474 and note; 37 N. W. 914), and 3 Am. & Eng. Enc. Law, 112, where the authorities are fully collated, and to which reference may be had by any one desiring to pursue the investigation.

2. The next assignment of error is in the instruction to the jury, that "actual ill will or malice will enhance the damages, and may be shown for that purpose, but need not be shown to entitle the plaintiff to recover." This was manifest error under all the authorities. While there is some conflict in the adjudged cases as to whether witnesses are absolutely exempt from liability to an action for defamatory words uttered or published in the course of judicial proceedings, it is agreed by all the authorities that they are presumptively so, and before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not

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pertinent to the issues, and not in response to questions asked by counsel. It seems to be the settled doctrine of the English courts that statements made by a witness in the course of a judicial investigation are absolutely privileged to that extent that no action for libel or slander will lie therefor: *Townshend, Libel and Slander*, § 223; *Goffin v. Donnelly*, 6 Q. B. Div. 307; *Seaman v. Netherclift*, L. R. 2 C. P. Div. 53; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; S. C. L. R. 7 H. L. 744. In this country, many, and perhaps a majority, of the courts have refused to adopt the absolute and unqualified privilege of a witness, as laid down by the English courts; but it is agreed that a witness is absolutely privileged as to everything said by him having relation or reference to the subject matter of inquiry before the court, or in response to questions asked by counsel, and presumptively so as to all his statements. Some of the cases hold that if he abuse his privilege by making false statements, which he knew to be impertinent and immaterial, and not responsive to questions propounded to him, for the purpose of malicious defamation, he may, upon an affirmative showing to that effect, be held in damages for libel or slander: *Rice v. Coolidge*, 121 Mass. 393; *White v. Carroll*, 42 N. Y. 161; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Hutchinson v. Lewis*, 75 Ind. 55; *Cooley, Torts*, 211; *Newell, Slander and Defamation*, 449; *Hoar v. Wood*, 3 Metc. 193; *Mower v. Watson*, 11 Vt. 536; *Shadden v. McElwee*, 86 Tenn. 146 (5 S. W. 602; 6 Am. St. Rep. 821 and note). In *Odgers on Libel and Slander*, page 191, it is said that "A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side; and even if he volunteers an observation (a practice much to be discouraged), still, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged; but a remark made by a witness in the box,

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wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously, for his own purposes, would not be privileged, and would also probably be a contempt of court." So also in *Hoar v. Wood*, 3 Metc. 193, Chief Justice SHAW said: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice, and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such case is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relative and pertinent to the cause or subject of inquiry."

And in *Mower v. Watson*, 11 Vt. 536, Mr. Chief Justice REDFIELD, after an extended examination of the authorities, says: "From the foregoing cases the true ground of the privilege is readily deduced. *Prima facie*, the party or his counsel is privileged for everything spoken in court. If any one considers himself aggrieved, in order to sustain an action for slander, he must show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously, and with a view to defame him. So that if the words spoken were pertinent to the matter in hand, the party and counsel may claim full immunity from an action of slander, however malicious might have been his motive in speaking them. So, too, if the words were not pertinent to the matter in issue, yet if the party spoke them *bona fide*, believing them to be pertinent, no action of slander will lie. So that the plaintiff, in order to maintain this action, must prove, first, that the words spoken were not pertinent to the matter then in hand, and, secondly, that they were spoken *bona fide*." So that whether we adopt the rule as prevailing in England,

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or as modified by some of the courts of this country, it is apparent that under either view the instruction that proof of actual malice was not necessary to enable the plaintiff to maintain this action was clearly erroneous. The words complained of were spoken by defendant when a witness in a judicial proceeding, in response to an interrogatory of counsel, and, under the rule most favorable to the plaintiff's contention, were presumptively privileged, and before this presumption can be overcome, the plaintiff must show affirmatively that they "were not pertinent to the matter then in progress, and that they were spoken maliciously and with a view to defame her."

We think it unnecessary to notice at this time the other assignments of error, and the judgment of the court below will be REVERSED and a new trial ordered.

[Argued June 20, 1893; decided July 10, 1893.]

STATE v. McGUIRE.

STATE v. BARNES. STATE v. COVACH.

[S. C. 33 Pac. Rep. 666; 21 L. R. A. 478.]

GAME AND FISH LAWS—CLOSE SEASONS.—It is not a violation of the game or fish laws of Oregon (Laws 1891, p. 33, as amended by laws 1893, p. 145) to have in one's possession during a close season, fish caught out of the state, or caught in the state during an open season.*

Multnomah County: MICHAEL G. MUNLEY, Judge.

*NOTE.—The right of a person to take fish from his own artificial pond during the close season is denied in the late case of *Com. v. Gilbert* (Mass.) 22 L. R. A. 439, holding that the legislature may make penal the possession of a fish which is not alive during the close season, even as to one by whom the fish was artificially propagated. Quite similar was the decision in the Illinois case of *People v. Bridges*, 16 L. R. A. 684, in 1892, holding that even as to a lake wholly upon lands of a private owner, and connected with an unnavigable stream only in time of high water, it was not unconstitutional to prohibit fishing with a seine during part of the year.

This is somewhat akin to the decision in *State v. Lewis*, (Ind.) 20 L. R. A. 52, to the effect that the possession of nets, which are not for use in waters where their use is permitted by statute, may be made a criminal

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These are cases against Wm. M. McGuire, F. C. Barnes, and G. Covach for violating the law regarding the having, or offering for sale, of fish during the close season on the Columbia River, and were tried as test cases. Defendants were convicted, and appeal. Reversed.

Cyrus A. Dolph (*Rufus Mallory*, and *Jos. Simon* on the brief), for Appellants.

Geo. E. Chamberlain, attorney-general, and *Wilson T. Hume*, district attorney, for the State.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

These are criminal actions brought by the state game warden in the justice's court for the South Portland Precinct, wherein the defendants, after trial, were severally convicted and fined. Thereafter each of the defendants prosecuted his appeal to the circuit court, where the cases were tried anew with like results, and from the judgments therein rendered the defendants have appealed to this court. The questions involved in each case being substantially the same, they were, as a matter of convenience, tried together in the circuit court, and the same course has been adopted in the argument here.

In *State v. Wm. McGuire*, the complaint charges that the defendant, "On the sixth day of March, A. D. 1893, in the county of Multnomah, and state of Oregon, did wil-

offense. And in the very late decision by the supreme court of the United States in *Lawton v. Steel*, 152 U. S. 133, affirming 7 L. R. A. 134; 119 N. Y. 226 (16 Am. St. Rep. 813), it is held constitutional to authorize the summary destruction of nets used for illegal fishing. From this decision Chief Justice FULLER and Justices FIELD and BREWER dissented on the ground that this was a deprivation of property without due process of law.

For power to regulate fisheries generally, see *Lawton v. Steele*, 7 L. R. A. 134 (119 N. Y. 226; 16 Am. St. Rep. 813), and notes; *Com. v. Manchester* 9 L. R. A. 336, 152 Mass. 230 (23 Am. St. Rep. 820); *State v. Harrub*, 15 L. R. A. 761 (95 Ala. 176; 36 Am. St. Rep. 195). For unconstitutionality of statute prohibiting the export of fish from a state, see *Territory v. Evans*, (Idaho) 7 L. R. A. 233.—REPORTER.

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fully and unlawfully have in his possession, then and there being the close season on the Columbia River, certain fish, to wit, steelhead salmon, caught in the said Columbia River contrary to the statutes in such cases provided," etc. At the trial it appeared from the testimony for the state that the defendant, at the time stated, which was shown to be the close season on the Columbia River, had in his possession a quantity of steelhead salmon, belonging to the fish dealers in Portland, and which had been caught in the Columbia River. The testimony for the defendant showed that he was the manager of a cold-storage ware house, and that he held the fish in question as custodian for his patrons; and he offered to show, against the objection of the state, that the fish had been caught in the open season on the Columbia River, and that the same belonged to the fish dealers in the city, who had stored them with him, and with whom he had agreed to preserve them in cold-storage, and deliver the same upon demand. The trial court sustained the objection to the introduction of this testimony upon the ground that the same was immaterial and incompetent, to which ruling the defendant excepted.

In *State v. F. C. Barnes* the complaint is the same, except that it charges that the defendant did "wilfully and unlawfully have in his possession and offer for sale," etc. The testimony for the state showed that at the time mentioned in the complaint, which was the close season on the Columbia River, the defendant was the proprietor of a fish market in the city of Portland, and had exposed for sale steelhead salmon which had been caught in the Columbia River. The defendant offered to show that such fish had been caught in the open season on said river, and had been preserved in cold storage from that time until they were offered for sale. This evidence was excluded on the same ground and an exception reserved.

In *State v. Covach* the complaint is the same as *State*

v. Barnes, aforesaid. The testimony for the prosecution showed that the defendant was the proprietor of a fish market, and at the time stated, which was shown to be the close season on the Columbia River, had in his possession, and exposed for sale, steelhead salmon which had been caught in the Umpqua River. The defendant offered to prove that the fish were caught during the open season on the river, etc., but the evidence was excluded, and an exception saved.

The instruction of the court to the jury, to which an exception was reserved, is the same in each case, and is as follows: "If you find beyond a reasonable doubt that the defendants, or either of them, had steelhead salmon, chinook salmon, silver salmon, or blueback, in their possession, or offered the same for sale, during the close season on the Columbia River, no matter where the same were caught or taken, or when they were caught or taken, then you must find the defendants guilty." The complaints are based on the act of 1891, entitled "An act to protect salmon in the state of Oregon," etc., and the act of 1893, amendatory thereof. Section 1 of the act of 1891 provides that "It shall not be lawful to take or fish for salmon in the Columbia River or its tributaries, by any means whatever, in any year hereafter between the first day of March and the tenth day of April, or between the tenth day of August and the tenth day of September, in any of the rivers and bays of the state, or the Columbia River, during the weekly close time,—that is to say, between the hours of six o'clock P. M. on each and every Saturday and six o'clock in the afternoon of the following Sunday": (Session Laws, 1891, p. 33). By the amendatory act of 1893, sections 3 and 6 of the act of 1891 are amended so as to read as follows: "Section 3. It shall not be lawful for any person or persons to take or fish for salmon in the waters of the Nehalem, Tillamook, Nestucca, Salmon, Siletz, Yaquina, Alsea, Siuslaw, Umpqua,

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Coos Bay, Coquille, Sixes, Elk, Chetco, Rogue River, Windchuck, or any of their tributaries, or in any other streams or bays in this state except the Columbia River and its tributaries, from the first day of November until the fifteenth day of December, or between the fifteenth day of April and the first day of June. Section 6. It shall be unlawful for any person or persons to receive or have in possession, or offer for sale or transportation, or to transport, during the close seasons named in this act, any of the following varieties or kinds of fish, which may be caught in any of these streams as aforesaid, viz.: chinook salmon, silver salmon, steelhead or blueback, and any person or persons violating any of the above sections shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum of not less than ten dollars nor more than two hundred and fifty dollars": Session Laws, 1893, p. 145.

The object of these actions is to obtain a construction of the act of the legislature of 1891 as amended by the act of 1893. Under the statutes there are several close seasons, but none of them are of general application throughout the state, except the weekly close season. There are times during the year when it is an open season on the Nehalem, Tillamook, etc., and lawful to catch fish in their waters, and it is a close season on the Columbia, and unlawful to catch fish in its waters. The particular question to be determined is, Does the statute prohibit a person from having in his possession, or offering for sale, during the close seasons named in the act, any fish of the varieties mentioned, which were caught in any of the rivers enumerated during their open seasons? The construction which the trial court gave to the statute by its rulings on the evidence, and its instruction to the jury, was that it is unlawful for a person to have in his possession, or offer for sale, during the close season on the Columbia, fish of the kind named in the act, "no matter where they were caught

or taken, or when they were caught or taken." In this view it was no defense that such fish were caught in the Umpqua or Columbia Rivers during the open seasons specified in the statute, when it was lawful to catch them, if the defendants had such fish in their possession, or offered them for sale, during the close season on the Columbia. Hence, as in the cases of the defendants McGuire and Barnes, fish caught during the open season on the Columbia, when it is lawful to catch them, and placed in cold-storage for their preservation, or, as to that matter, put up in salt or cans, cannot lawfully remain in the possession of the owner, or be offered for sale, during the close season on that river, or, as in the case of the defendant Covach, it would be unlawful for a party to have in his possession, or offer for sale, fish caught during the open season on the Umpqua, when it is lawful to catch them, if it happens to be the close season on the Columbia. Under this construction of the statute, a party who has in his possession such fish, or who offers them for sale, although lawfully caught, whether in or out of the state, and his private property, is liable to punishment, and his property rendered worthless or destroyed. Nor is this all. Salmon caught on Friday night or Saturday morning, which may come into the cannery or market at six o'clock Saturday evening,—the commencement of the close season each week,—must be immediately destroyed, or the party having them in his possession, or offering the same for sale, during such weekly close season, will be exposed to prosecution and punishment. A statute which leads to such consequences ought not only to be clear, but mandatory, and the act done under it not only within the letter, but within the spirit, of the law, to authorize its enforcement.

This construction, however, counsel for the state insist must be given to the statute, to make it effective, and carry out the purpose of the law. Their contention is that the object of the statute is to protect such fish during the

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close season in order that they may have an opportunity to propagate their species, and be preserved from extermination, and that if any other construction is adopted, fish could be caught in the open season in such numbers as to supply the market during the close season by putting them in cold-storage until wanted, and by so doing the stock of fish would be seriously impaired, or exhausted, and but a few or none would be left to propagate their kind, and, finally, that such a construction is necessary to prevent evasion of the statute, and make the proof of its violation easy and accessible. Hence they argue that the fact of the fish being caught in a lawful season constitutes no defense, so that the time and place when and where such fish were caught are not material. In support of this view they assert that the same principle governs as in those cases where game has been lawfully killed in one state, and exposed for sale in another, during the prohibited season in the latter state. This principle perhaps finds its best illustration in *Phelps v. Racey*, 60 N. Y. 10, where a statute declared that no person should expose for sale, or kill, or have in his possession after it had been killed, any quail or other game, between the first day of January and the twentieth day of October. The defendant was indicted for having quail in his possession in March. He had invented an apparatus to preserve game, and that which he had in his possession, and specified in the complaint, was killed in New York in the open season, or received from Minnesota or Illinois, where the killing at the time was legal, and put up by him in his apparatus in the month of December. CHURCH, C. J., said: "The language of these sections is plain and unambiguous; hence there is no room for construction. It is a familiar rule that when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is, that 'any person having in his or her possession,' between certain dates, certain specified game killed, shall be liable to a

penalty. The time when, or the place where, the game was killed, or when brought within the state, or where from, is not made material by the statute, and we have no power to make it so. * * * That it was either killed within the lawful period, or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing."

In *Magner v. People*, 97 Ill. 320, among other things, SCHOLFIELD, J., says: "We think it is obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the state, and afterwards bringing them into the state for sale, or by other subterfuges and evasions. It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure, or in anywise affect, the game here; but a law which renders all sales and all possession unlawful will more certainly prevent any possession or any sale of the game within state than will a law allowing possession or sales here of the game taken in other states. This is but one among many instances to be found in the law where acts which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful." See also *State v. Randolph*, 1 Mo. App. 15; *Game Association v. Durham*, 51 N. Y. Sup. Ct. 306; *Whitehead v. Smithers*, 21 Monk's Eng. Rep. 458.

It is also held that such statutes are not in conflict with the constitutional provision that no person shall be deprived of his property without due process of law, and are not regarded as an interference with interstate commerce: *Phelps v. Racey*, 60 N. Y. 10; *State v. Randolph*, 1 Mo. App. 15. But there are other decisions, later in

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point of time, holding a contrary doctrine, which cannot be wholly reconciled by the difference in the language of the statutes. In *People v. O'Neil*, 71 Mich. 325 (39 N. W. 1), it was held that the possession of game killed in another state is not an offense under the Michigan act of 1881, which makes it an offense to have game in possession for the purpose of sale, during a certain period of the year, since the purpose of the act as shown by the title is the protection of game within the state. CHAMPLIN, J., after reviewing the authorities already referred to, said: "A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must not only be within the letter, but within the spirit, of the law to gain my assent to its enforcement. Our statute requires no such strict construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to health, but the whole end and object of the legislation is to protect and preserve the game of Michigan. * * * The various provisions of the act are all directed to that purpose. And how it can be held that this law is violated, either in letter or spirit, by importing game from other states to supply food to citizens of this state, is a point I am unable to understand. The only ground upon which such construction is attempted to be defended is that it prevents evasion of the statute; that game might be killed in this state in violation of law, and shipped to another state, and there re-shipped into this state, and the prosecution might be unable to prove that it was Michigan game, killed in violation of law. That may disclose a defect of proof; but I submit it does not apply to cases where the fact is conceded or proved to the satisfaction of the jury that the game was not killed, in the violation of law." In the same case, CAMPBELL, J., said: "Concurring as I do,

in the meaning of our statute as explained by my brother CHAMPLIN, I do so for the further additional reason that I do not think it would be competent for our legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound. While in England the power of parliament cannot, perhaps, be questioned by courts, there is no such rule here, and I cannot see on what principles such decisions are maintainable. It is not competent for any American statute to raise conclusive presumptions of guilt in any case. This is well settled. When the possession is traced back of the time when it became unlawful to take game, the presumption has no further force as evidence, and what was then lawful cannot be made a crime by lapse of time only."

In *Commonwealth v. Wilkinson*, 139 Pa. St. 304 (21 Atl. 14), in construing an act which provides that "No person shall kill, or expose for sale, or have in his possession after the same has been killed, any quail between the fifteenth day of December, in any year, and the first day of November following," PAXON, C. J. said: "The manifest object of this act was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, and it would be a forced construction to hold that it was intended to exclude from our markets quail and other game killed in other states, where by the laws of those states the killing of them was lawful. * * * The law was not intended to have any extra territorial effect, and, if it was, it would be nugatory. * * * The construction claimed for the act by the commonwealth would render any one a criminal who lawfully killed quail in another state, and brought them here for his own use. It would be *prima facie* evidence of a

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violation of the act, and if he could not show as a defense that he killed them outside the commonwealth, he would have no defense at all. The matter is too plain to require elaboration." In *Allen v. Young*, 76 Me. 80, it was held that where a statute made it an offense to kill deer at a certain time, or to transport them from place to place during that time, it was not an offense to transport from place to place during the prohibited season deer killed before. See, also, *Commonwealth v. Hall*, 128 Mass. 410; *Davis v. McNair*, 7 Crim. Law Mag. 219; 21 Central Law Jour. 480.

In these cases the courts held that the object of the act was to protect game in the state, as indicated by the title, and that the statute sought to attain this object by punishing the taking or killing of such game in the state during the prohibited seasons, or the offering for sale, or having in possession, in the state, during such times, of game so taken or killed. So that if the killing or taking of game in the state was at a time when it was lawful, under the statute, to do so, the offering for sale, or having in possession, of game so taken or killed, was not an offense against the statute. If our statute will bear this construction, then it was only intended to prevent the taking or catching of the salmon specified, on the rivers enumerated, within the state, during their close seasons, and to render unlawful, or make a misdemeanor, the offering for sale, or having possession of, salmon so taken or caught, on such rivers in this state, during such close seasons. In this view, the offering for sale, or having possession of, salmon during the close seasons, which had been lawfully taken or caught, is not an offense. The trial court, however, construed the act differently, holding, as indicated by its instruction, that the offering for sale, or having possession of, the fish mentioned in the complaint, during the close seasons named in the act, was a misdemeanor "no matter where the same were caught or taken, or when they were caught or taken." So, also, the ruling of the court that

the proof offered by the defendants, viz: that the fish in question were caught during a lawful season, was immaterial, was based on the theory that the time when, and place where, the fish were caught, was not made material by the statute, and, therefore, constituted no defense. The effect of this construction is to declare that, in order to protect the salmon in this state, it was the intention of the statute to punish the offering for sale, or the having in possession, of salmon of the varieties specified, during the prohibited seasons, no matter whether they were lawfully caught within or without the state; in a word, that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish or game lawfully caught or taken to be the subject of an offense, by the simple possession of it. A construction leading to such injustice ought to be avoided, if it can be reasonably done.

Salmon fish is an article of food, and the law interdicting the catching of them at certain seasons is not because they are unfit for use, or unwholesome, but to protect and preserve such fish in this state. The constitution requires the object of every act to be expressed in its title. The object of the act, as expressed by the title, is to protect salmon in the state of Oregon. All its provisions are directed to this purpose. None of them would be violated by bringing fish which had been lawfully caught in other states into this state. Is it violated by offering for sale or having in possession fish during the prohibited seasons which had been caught in the open seasons on the river, when it was lawful to do so? Certainly, if the legislature intended to declare the mere possession of such fish during the close season an offense, no matter where or how lawfully caught or taken, words could easily have been found to express such intention. The section on which the

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indictment is found reads: "It shall be unlawful for any person or persons to receive, or have in possession, or offer for sale, etc., during the close seasons named in the act, any of the following varieties or kinds of fish, which may be caught in any of these streams as aforesaid, viz.: chinook salmon," etc. A violation of this section involves the catching of such fish in the streams enumerated in the act, and contrary to the provisions of such act. "Which may be caught in any of these streams as aforesaid," is the language of the section. The words "as aforesaid" do not relate to the streams themselves, but to the time or manner of taking fish from them. "As" qualifies "caught," making the sentence read, by the transposition, "caught as aforesaid in any of these streams," and means fish caught during the close seasons aforesaid in any of these streams. This is in accordance with the grammatical relation of the words. On the other hand, if these words relate to the "streams," and the construction of the act is as claimed by the prosecution, then a party having in possession, or offering for sale, during the close season upon the Columbia River, fish of the variety described in the complaint, no matter what their condition, where or how lawfully they were caught, is guilty of a crime. In the case before us, when the fish were caught in the rivers of this state, according to the conceded facts, it was lawful to do so, and when so caught and reduced to possession of the party, they became his property, and he could deal with them in the same way as with any other personal property. Having become his lawful private property, must he subsequently, when such fish are wholesome, and not detrimental to the public health, destroy them, or be exposed to punishment for having the same in his possession? To subject a party to such an alternative involves an absurdity and injustice that we are bound to avoid, if the act is susceptible of another construction.

The rule is well established that "where the language

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of the legislature is fairly susceptible of two different meanings, that should be preferred which excludes and prevents consequences that are mischievous and unjust": In Code's case, 3 Ont. App. 550, Lord Justice BRAMWELL said: "When a particular construction of an act of parliament, or a particular proposition of law, leads to hardship, there is a presumption against that construction or proposition being right, because I do not think our law does, usually at least, lead to hardship": *In re Hooper*, 11 Ch. Div. 322. So that, if the language of the statute was susceptible of two constructions, it would be our duty to adopt that construction which would avoid unjust consequences. But we do not think such is the case here. Looking at section 6 as amended, it would seem that it was to avoid the construction contended for by the prosecution that the legislature modified the otherwise absolute provision of section 6 by the use of the words, "which may be caught in any of these streams as aforesaid." The statute, as it stands, was only intended to prevent the catching of the varieties of fish specified during the protected seasons on the rivers enumerated in the statute, and to render unlawful the offering for sale, or having possession of, such fish so caught in the state during the close seasons. The indictment is drafted upon this construction of the statute. The defendants are charged by it with having in their possession or offering for sale during the close season certain fish, viz: steelhead salmon, caught in the Columbia River contrary to the statute. Steelhead salmon are caught in the Columbia River contrary to statute only during the close seasons on that river. It is not in contravention of the statute to catch such fish during the open seasons on the Columbia or other rivers enumerated. No offense, therefore, according to the admitted facts, was committed when the fish were in fact caught, and consequently the defendants did not have in their possession or offer for sale, fish caught contrary to the statute. In view of these considera-

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tions, we think before a conviction can be had under the statute, it must appear that the defendants had in their possession, or offered for sale, during the close seasons mentioned therein, the kinds of fish specified, which had been caught during the close season from the streams in such statute enumerated. It results that the judgment of conviction in each of the above entitled cases must be reversed and a new trial ordered. **REVERSED.**

[Argued May 29, 1893; decided July 10, 1893.]

NICKUM v. GASTON.

[B. C. 33 Pac. Rep. 671.]

1. **VENDOR AND PURCHASER—LAND SOLD FOR TAXES—PURCHASE BY OWNER—PRIOR LIENS NOT AFFECTED.**—An owner or mortgagor, or his successor in interest, remaining in possession of land, cannot permit the mortgaged property to be sold for taxes, and become the purchaser thereof, either directly or indirectly, for the purpose of cutting off a prior lien. If the owner himself buy at the tax sale, or if he acquire the tax title from a stranger who purchased at the sale, it will operate only as a payment of the taxes; but if the purchase at the tax sale is made by some third person in pursuance of a fraudulent arrangement with the owner to cut off a prior lien, such third person thereby acquires a title good against every one except those having equities in the premises, among whom will be prior lien-holders.
2. **STATUTE OF LIMITATIONS ON TAX SALES—PURCHASE BY OWNER—FRAUD—CODE, § 2840.**—Where an owner in possession of land fraudulently permits it to be sold for taxes in order to cut off a prior lien, and buys in such tax title, either directly or indirectly, the limitation of three years provided by section 2840, Hill's Code, does not apply to actions for the recovery of such property by a prior lien-holder.
3. **IDEM—NOTICE—BONA FIDE PURCHASER.**—Where an owner in possession of land purposely permits it to be sold for taxes in order to cut off a prior lien, any purchaser other than the owner takes the title subject to the prior lien, and all persons taking from such purchaser with notice will also hold subject to the prior lien; but *bona fide* purchasers from the tax sale purchaser, without notice, take freed from the prior lien.
4. **APPEAL—EXCEPTIONS TO INSTRUCTIONS.**—An exception to a series of instructions is sufficient to secure their consideration on appeal, where they in effect assert but one proposition of law.

24	380
27	515
38	323
24	380
133	370
24	380
135	136
24	380
38	196
38	307
38	567
24	380
30	279
39	375
24	380
443	365
24	380
45	430

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5. **GENERAL EXCEPTION TO INSTRUCTIONS.**— A general exception to an instruction is sufficient, when it is challenged on the ground that it is not the law as applied to the facts of the case.
6. **PRESUMPTION OF HARMLESS ERROR.**— When prejudicial error affirmatively appears on the face of the record, the appellate court cannot presume that it was harmless; the matter rendering it harmless should appear in the bill of exceptions.

Multnomah County: E. D. SHATTUCK, Judge.

This action was originally commenced by J. M. Nickum on the fifteenth day of October, 1891, against Walter Danvers and Isabella Danvers to recover the possession of the northeast fractional quarter of section twenty, township one south, of range two east, containing one hundred and fifty-eight acres of land more or less. The complaint was in the usual form. Tiny Gaston filed a petition claiming that Walter Danvers and Isabella Danvers were tenants of hers as to all of said land except thirty acres in a square form in the northeast corner thereof, and she was, by order of the court, made a party defendant, and defended as all of said land except said thirty-acre tract, for which the said Walter Danvers and Isabelle Danvers defended. Walter Danvers and Isabelle Danvers filed a separate answer claiming title to said thirty-acre tract under the said Tiny Gaston, and by adverse possession. The defendant, Tiny Gaston, filed her separate answer denying that plaintiff had any title to said property or any part thereof, and denying his right to the possession of the same or any part thereof, and setting up title to all of said land, excepting said thirty acres in herself.

For the purposes of this appeal it is sufficient to say that on the tenth of April, 1874, one G. W. Brown, who was the owner of the land in controversy, executed and delivered to Susannah Nickum a mortgage thereon to secure the payment of the sum of six hundred dollars and interest, due one year after the date thereof. On the twenty-ninth of the same month Brown sold and conveyed the land to

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one Laura Bennett, subject to the Nickum mortgage, and in 1879 it was sold for the taxes of the preceding year to one Lucy Mason, who received and recorded her deed therefor on the eighteenth of July, 1881. On the twenty-second of December, 1882, default having been made, Susannah Nickum commenced a suit to foreclose her mortgage, making Lucy Mason a party thereto, alleging that her purchase of the land at the tax sale was fraudulent and void as to the mortgage. Such proceedings were afterwards had in the foreclosure suit as that on the nineteenth of September, 1884, a decree was entered foreclosing the mortgage as to all the defendants except Lucy Mason, and dismissing the complaint as to her "without prejudice to plaintiff's right to have said Lucy Mason's title to said premises determined in a proper proceeding." On a sale of the premises under the decree of foreclosure Susannah Nickum became the purchaser, receiving her deed on the twenty-first of March, 1885, and she has subsequently conveyed the premises to the plaintiff J. M. Nickum. On the twenty-first of November, 1884, Lucy Mason sold and conveyed the land in controversy to the defendant Tiny Gaston, who gave evidence on the trial tending to show that she was a *bona fide* purchaser for value and without notice of any fraud in the purchase of the land by Lucy Mason, and that she and her grantor had been in the adverse possession of the land from the date of the tax deed to the time of the trial. To avoid the effect of the tax deed the plaintiff gave evidence tending to show that the purchase by Lucy Mason was made in pursuance of a fraudulent arrangement between her and Laura Bennett, who owned and was in possession of the land at the time the assessment was made, by which Laura Bennett was to suffer the land to be sold for taxes in order to cut off the Nickum mortgage, and Lucy Mason was to become the purchaser at such sale and subsequently convey the land to her, and that the defendant Tiny Gaston

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purchased of Lucy Mason with knowledge of these facts. The court instructed the jury in effect that if such an arrangement or agreement existed between Laura Bennett and Lucy Mason for the purpose of defeating the Nickum mortgage, the tax sale "did not confer any title upon the purchaser, but simply stands as a payment of the taxes,—it has no further force or effect,"—and "could not be used for any other purpose except to pay the taxes," and that the three years' limitation provided in section 2840, Hill's Code, has no application to this case.

The contention for appellant is that all inquiry into the validity of the tax sale to Lucy Mason is cut off by section 2840, Hill's Code, which provides that "any suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter," unless the plaintiff can show that the tax for which the land was sold was actually paid before the sale, or that the land was subsequently, and within the time allowed by law, redeemed; or, if this is not so, that the tax deed was at least *prima facie* valid, and will support the title of defendant if she is a *bona fide* purchaser for value, whether the alleged combination between Laura Bennett and Lucy Mason existed or not; and hence it was error, under the issues in this case, for the court to instruct the jury that if they believed such an arrangement did exist, the tax deed was of no effect, and "could not be used for any purpose except to pay the taxes." For the plaintiff the contention is that, as Laura Bennett was the owner and in possession of the property at the time of the assessment, it was her duty, as against the mortgagee, to pay the taxes, and if she entered into an arrangement with Lucy Mason by which she was to suffer the land to be sold for such taxes, and purchased by Lucy Mason, for the purpose of cutting off the lien of the Nickum mort-

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gage, the sale operated merely as a payment of the taxes, and Lucy Mason did not acquire, either by her purchase or tax deed, any right or title whatever to the property, which she could convey to the defendant.

Upon the trial the jury returned a verdict in favor of Walter and Isabella Danvers for the thirty-acre tract claimed by them, and in favor of the plaintiff for the remainder of said quarter section of land described in the complaint. Judgment having been entered accordingly, the defendant Tiny Gaston appeals. Reversed.

P. L. Willis, and Seneca Smith, for Appellant.

Albert H. Tanner (John H. Mitchell & Son on the brief), for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

1. The law is well settled that a mortgagor, or his successor in interest, remaining in possession of the land, cannot permit the mortgaged property to be sold for taxes, and become the purchaser thereof, either directly or through the agency of another, for the purpose of cutting off a prior lien. He is under a legal obligation to pay the taxes, and cannot, by neglecting to perform this duty, and suffering the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased thereat. By such a purchase he does not acquire, as against the lien-holder, any title or right to the property better than he had before, but the sale will operate only as a mode of paying the taxes, leaving the title in the same condition as if no sale had been made. "This principle is universal," says Judge Cooley, "and is so entirely reasonable as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance": Cooley on Taxation, 345; Blackwell on Tax Titles, §§ 566, 591;

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Christy v. Fisher, 58 Cal. 256; *Lewis v. Ward*, 99 Ill. 525; *Ralston v. Hughes*, 13 Ill. 470; *Edgerton v. Schneider*, 26 Wis. 385; *Bassett v. Welch*, 22 Wis. 175. When the purchase at such a tax sale is made by the owner directly, or when he afterwards acquires title from a stranger who purchased at the sale, it operates, as to the lien-holder, only as a payment of the taxes, and the owner does not acquire any title to the property as against such lien-holder better or stronger than what he had before the sale. It is, in effect, as if no sale had in fact been made, but as if the owner had discharged his duty by paying the taxes before the sale. But where the purchase is made by, and the deed taken in the name of, some third person, although in pursuance of a fraudulent arrangement between the owner and the purchaser to cut off some prior lien, the sale is not entirely void, but the purchaser obtains a title to the land good against the world, except those who might have equities in respect to it, and who should see fit in a proper mode to assert their equities. There is no resulting trust in favor of the owner, nor can the purchaser be required or compelled to convey the property to him or as he may direct: *Conn. Mutual Life Ins. Co. v. Bulte*, 45 Mich. 113 (7 N. W. 107); *Maxfield v. Willey*, 46 Mich. 252 (9 N. W. 271). By his participation in the fraud, he has put it out of his power to ask the interposition of a court in his behalf, and the purchaser may withhold the title from him. Between the owner and the purchaser the sale is valid, and passes the title; but the lien-holder whose right is sought to be cut off by such a sale and purchase may insist that as to him the sale shall be treated as inoperative to affect his lien, and the purchaser should be deemed to have acquired the title to the property subject to such lien.

2. It would necessarily follow, then, that where the land is bought at the tax sale by one in possession and under obligation to pay the taxes, or is by such an one

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bought from a stranger who purchased at the tax sale, the statutory period in which a "suit or proceeding" can be maintained for the recovery of land sold for taxes would not bar the right of the lien-holder to enforce his lien, and this is the construction given to a similar statute by the supreme court of Wisconsin. In *Jones v. Davis*, 24 Wis. 229, which was a proceeding to enforce a judgment lien, the defendant claimed title under a tax deed which had been recorded for a time exceeding the statutory period in which an action could be maintained for the recovery of land sold for taxes, and contended that the proceeding was barred, but it was held that the lien of the judgment was not cut off or destroyed by the tax deed, the court by COLE, J., saying: "The answer shows that the tax title was obtained by the grantors of the defendant, who were in possession, and under obligation to pay the taxes. A person in possession of land, and whose duty it is to pay the taxes at the time of the assessment, cannot permit his own property to be sold for taxes, and then obtain a tax deed for the purpose of cutting off a prior lien. This point has been so decided in the cases of *Smith v. Lewis*, 20 Wis. 369; *Bassett v. Welch*, 22 Wis. 175." And to the same effect is *McMahon v. McGraw*, 26 Wis. 614. In dealing with the respective rights of the lien-holder and a third party who purchased under an agreement with the owner, the transaction must be treated as if no sale had been made. The lien-holder's rights, because of the fraud, are unaffected by the sale, and the purchaser takes the property subject to the lien. It would seem clear therefore, that the right of a lien-holder to enforce his lien against such a purchaser, or one claiming under him with notice, is not barred by the statute. A contrary doctrine would enable a party to profit by his own fraud, and this the law does not suffer or allow. The rule as announced by the court in the instruction excepted to we think, therefore, correctly stated the law as applicable to a controversy between the lien-holder

and the purchaser at a tax sale, under the circumstances stated in the instruction, or to one claiming under him with notice.

3. But when it is remembered that the defendant claims, and gave evidence tending to prove, that in purchasing this tax title from Lucy Mason she was a *bona fide* purchaser for value, and without any notice, knowledge, or intimation of any fraudulent or other arrangement between Laura Bennett and Lucy Mason with reference to the sale, it will be observed that the effect of the instruction that if such combination existed the tax deed under which Lucy Mason held the only title she attempted to convey "is of no avail except to pay the taxes," and "could not be used for any other purpose," would be to defeat the title of the defendant, even if she was a *bona fide* purchaser for value, and in this view was erroneous, as applied to the facts of this case. In *Van Shaack v. Robbins*, 36 Iowa, 201, which was a proceeding to set aside a tax sale and title, it was conceded that there was a fraud on the part of the original purchaser at the tax sale, but the tax title was held valid in the hands of a *bona fide* purchaser, notwithstanding the statute provided that if fraud in the purchaser at a tax sale is established, "such sale and title shall be void," the court through COLE, J., saying: "The manifest and unmistakable purpose and intent of the entire revenue act is to give value to and confidence in tax titles. This value and confidence would be destroyed and the intent defeated by a holding which would render any tax title in the hands of an innocent purchaser wholly worthless and void, upon the showing of a fact which might not be in his power to ascertain in advance of his purchase. The owner of the land sold for taxes has it in his power, under the rule indicated, by diligence to avoid the sale for fraud at any time within three years, and even after that if the title is made to and held by the purchaser; while under a contrary rule a purchaser would

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be entirely unable to protect himself in any case. The only sure protection a man could have under such rule would be to refuse to make any purchase of a tax title; and if all should thus act the entire purpose of the statute would be defeated. In our opinion, then, the statute is to be construed the same as if it read, 'such sale and title shall be avoided.'" So in this case, if the owner of the land neglected to pay the taxes, it was not only the privilege, but the duty, of the mortgagee to do so before this sale, or to redeem the property within the time allowed by law therefor. She could have paid the taxes or redeemed the land, and added the amount thereof to her lien, (section 2838, Hill's Code,) and thus prevented or defeated the sale without any injury to herself. Because she neglected to do either she was in default, and the sheriff, in consequence thereof, was required to make a deed to the purchaser; and if the defendant bought the land from the holder of the tax deed in good faith, and without notice of fraud, the mortgagee must suffer the loss "which she could have prevented by the performance of her duty or by proper diligence."

The judgment of the court below must therefore be REVERSED and a new trial ordered.

ON REHEARING.

[S. C. 35 Pac. 31.]

MR. JUSTICE BEAN delivered the opinion of the court:

In order that the questions presented on this rehearing may be fully understood, it is necessary to set out more at length than was done in the former opinion the facts in this case. The record recites that "After some instructions had been given by the court, Mr. Tanner, attorney for the plaintiff, addressing the court, said, 'I think there is one matter your honor has not instructed the jury upon, and that is the question about the arrange

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ment between Laura Bennett and Lucy Mason about the payment of the mortgage.' Whereupon the court instructed the jury as follows, to wit: 'When fraud is charged, it ought to be clearly made out. It is charged here [that] there was a fraudulent combination between Lucy Mason, by her agent and father, O. P. Mason, and Laura Bennett and J. A. Bennett, to have this land sold for taxes in order to escape the claims of Susannah Nickum under her mortgage. The effect which any such combination would have might be very easily defeated, or it might be made of very little avail, by the mortgagee paying the taxes herself. Our law provides that the mortgagee may pay any taxes levied upon the land upon which he holds a mortgage, himself, if the mortgagor neglects it, and then may tack the amount so paid as taxes to his debt, and have it refunded to him when the mortgage is paid off. But nevertheless it is held that when parties occupying such relation as vendor and purchaser, mortgagor and mortgagee, when parties occupying that position conspire together to have the land which is mortgaged, and upon which the mortgagor ought to pay the taxes, sold for taxes, and the mortgagor, or some person engaged in the conspiracy, bid it in, such a sale amounts to nothing so far as conferring any title upon the purchaser, but simply stands as payment of the taxes; it has no further effect. Question is made here whether such combination existed or not in this case, and this question I submit to you to find. If you find that there was such combination, agreement, or arrangement for the purpose of defeating this mortgage, if they could, then the tax sale is of no avail, except to pay the taxes which had been levied.' Mr. Tanner then, again addressing the court, said: 'I suppose if the jury should find that this scheme was entered into, and that buying in could only act as payment of the taxes, that then this three years' limitation would not apply.' Whereupon the court then further instructed the jury as follows, to wit: 'I don't

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see any application at all. It could not be used for any other purpose except to pay the taxes.' To each of these instructions, defendant Tiny Gaston, by her counsel, then and there duly excepted, and the exceptions were allowed by the court." From the foregoing it appears that the effect of the instructions of the court was that if the fraudulent combination between Lucy Mason and Laura Bennett, referred to, in fact existed, the tax sale amounted to nothing, so far as conferring any title upon the purchaser, but simply stood as a payment of the tax, and could have no further force or effect, and this we have held to be error as applied to the facts of this case.

The respondent insists, upon the rehearing, that the exceptions do not present for consideration in this court the question as to the effect of the tax sale, because (1) it does not point out particularly the portion of the charge excepted to, nor does it state the grounds of the objection and exception; (2) the instructions are at most only defective in form, or deficient in fullness, and the attention of the court should have been particularly called to such defect, so that it might have corrected the error into which it had fallen; and, (3) that, inasmuch as the entire charge is not in the record, we must assume that the court in some other portion of it gave the law correctly as to the rights of a *bona fide* purchaser under the tax deed; and now of these objections in their order.

4. We agree with counsel for respondent that an exception to a charge of the court must point out distinctly the particular portion excepted to, and that a general exception to the entire charge, or to a series of propositions, if any one of them is correct, is insufficient. In this case, however, the exceptions show distinctly that appellant excepted to particular portions of the charge, which, in their entirety, we have held erroneous as applicable to the facts of this case. The instructions excepted to, if they may be considered as a series of instructions, amount in

effect to asserting but one proposition of law, namely, that if the jury should find, from the evidence, that a fraudulent combination between Mason and Bennett for the sale and purchase of the property in controversy for delinquent taxes existed, that such purchase, and the sheriff's deed acquired in accordance therewith, conveyed no title whatever. This being the case, we think the exceptions are clearly sufficient.

5. It is also contended that the exceptions are insufficient because they do not state the grounds of the objection. But when an instruction is challenged on the ground that it is not the law as applied to the facts of the case, we understand a general exception is sufficient. We know no rule of law requiring counsel in such case to embody in his objection an argument or the reason for his contention. It is sufficient to notify the court that he challenges the correctness of the law as stated by it in its instructions. When the charge, without asserting an erroneous proposition of law as applied to the case, is ambiguous, or is deficient in fullness, or does not go far enough, or is not sufficiently explicit, the party excepting should call the attention of the court to the particular grounds upon which he objects, so it may be corrected: *Kearney v. Snodgrass*, 12 Or. 317 (7 Pac. Rep. 309). But when an erroneous proposition of law is asserted, as applied to the case on trial, it is sufficient to except generally, because in such a case the supposition is that the question has been previously fully argued and presented, and the court's opinion formed, and that it would not be modified or changed by again calling its attention to the particular reasons or grounds upon which counsel contends the instruction to be erroneous. In the case at bar the court asserted what we conceive to be an erroneous proposition of law, as between the parties to the record, and under the issues in the case, hence the rule invoked does not apply.

6. Again, it is urged that, inasmuch as the entire

Points decided.

charge is not in the record, we must assume that the court did particularly instruct the jury as to the rights of the defendant as a *bona fide* purchaser, but there are two sufficient reasons why this position is not well taken. In the first place, it does affirmatively appear from the record that the portion of the charge excepted to is all the court said upon the effect of the alleged fraudulent combination; and, second, that the attempted application of the well-known rule invoked by counsel in this case, that error will never be presumed, but must affirmatively appear, is answered by STRAHAN, C. J., in *DuBois v. Perkins*, 21 Or. 190 (27 Pac. Rep. 1044), in this language: "While it is true that error will never be presumed, the converse of the proposition is equally true. When error does affirmatively appear, it will not be presumed that it was rendered harmless, or removed. If it were so, the respondent must see to it that the matter which renders it harmless, or removes it, is made to affirmatively appear in the bill of exceptions." When error affirmatively appears upon the face of the record, which is prejudicial, as it does in this case, we cannot assume that it was harmless.

In consequence of these views, the former judgment is adhered to. REVERSED.

[Argued June 27, 1893; decided July 10, 1893.]

MING YUE v. COOS BAY RAILROAD COMPANY.

[S. C. 33 Pac. Rep. 641.]*

MECHANICS' LIENS — LAW AND EQUITY.—Under the provisions of the Oregon law retaining the distinction between suits in equity and actions at law, though abolishing the difference in the forms, a complaint for the foreclosure of a mechanics' lien, which does not state a cause of suit, cannot be retained and treated as an action at law to recover money. *Beacanon v. Liebe*, 11 Or. 443, approved and followed.

Coos County: MARTIN L. PIPES, Judge.

* See also *Burrage v. Bonanza Gold Mining Co.* 12 Or. 169 to the same effect. — REPORTER.

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Suit by Ming Yue, Ah Mung, and Ang Ark, partners as Kwong Lee Kee & Co., having their place of business in San Francisco, California, to foreclose an alleged lien on the railroad of the Coos Bay, Roseburg, and Eastern Railroad and Navigation Company. Defendant had a decree on demurrer to the complaint, and plaintiffs appeal. Affirmed.

J. M. Siglin (*Bull & Cleary* on the brief), for Appellants.

J. A. Gray, and *J. W. Hamilton*, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is a suit in equity to foreclose a mechanics' lien for labor furnished and performed in the construction of the defendant's railroad. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit, which demurrer the court sustained, and, the plaintiffs refusing to further plead, rendered judgment dismissing the complaint, from which judgment this appeal is taken.

The contention for the plaintiffs is, that even if the complaint fails to set out a case for equitable cognizance, it sufficiently states a cause of action for the recovery of the money due for labor performed, and hence, that the court erred in dismissing the suit. In the practice codes of nearly all the states, not only the old forms of action, but the distinctions between actions at law and suits in equity, have been abolished. In this state the distinction heretofore existing between forms of action at law is abolished (section 1, Hill's Code), but proceedings in equity are still kept distinct from actions at law. (Code, chapter V. "Suits in Equity.") In this respect our code system differs from the code system of many other states. In our practice, a suit is in equity, and relates to something of equit-

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able, as distinct from legal, cognizance. Section 380, Hill's Code, provides that "The enforcement or protection of a private right, or the prevention of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law," etc. "The absence of a plain, adequate remedy at law," SWAYNE, J., said, "affords the only test of equitable jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings": *Watson v. Sutherland*, 5 Wall. 79.

The jurisdiction in equity and law is distinct and independent. Where, therefore, there is a plain, adequate, and complete remedy at law, a court of equity is without jurisdiction to grant relief. If the cause of action involves a purely legal right, it can only be prosecuted and tried at law. In *Phipps v. Kelly*, 12 Or. 216, it is said, "A strictly legal right, unaffected by any equitable incident, for which there is a legal remedy adequate and speedy for its enforcement or protection, is not properly a subject-matter within the legitimate province of equity, and of which equity could take cognizance without depriving the defendant of his constitutional rights to a trial by jury." The distinction between actions and suits is not abolished by our Code. In *Beacannon v. Liebe*, 11 Or. 443, it was claimed that our Code had so blended law and equity that if the facts alleged in the complaint showed a cause cognizable in equity, although it was brought as an action at law, the court ought not to dismiss it but retain and try it as a suit, but the court refused to accede to this view, THAYER, J., saying: "Our Code, I think, preserves the forms of actions and suits as distinct from each other. There may be no very good reason why the distinction has been retained, but it is too strongly indicated in the Code to be ignored by the courts; and any change made in the practice in that particular must be effected by the

Per Curiam.

legislative branch of the government. Litigants, in my opinion, will be compelled at their peril to elect as to which of the two jurisdictions they will resort to for relief, so long as the present line of partition between them is kept up." When, therefore, the plaintiffs, being in equity, failed to state in their complaint a cause of suit, notwithstanding they may have stated a cause of action, the court had no jurisdiction to retain and try such action, but was bound to dismiss the suit, and leave the plaintiffs to prosecute their action, if they have one at law.

There was no error and the decree must be **AFFIRMED**.

[Decided July 5, 1893.]**CLEMMENSEN v. HOLCOMB.**

[S. C. 33 Pac. Rep. 612.]

Coos County: J. C. FULLERTON, Judge.

Defendants appeal. Affirmed.

John F. Hall, for Appellants.

S. H. Hazard, for Respondent.

PER CURIAM.—This is a suit between partners for an accounting. The record discloses that all the material allegations of the complaint were denied by the answer and that the only issues in the case to be determined are questions of fact. The business in which the partners were engaged was brewing beer, and, in connection with the brewery they kept a saloon. One of the partners attended to the brewing and the other conducted the saloon and kept the books and accounts. The latter died leaving the accounts in a state of confusion, and no one being able to fully explain them, the referee found it difficult to accurately state the accounts as directed by the court. In

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looking at the books we think the referee and the court below reached, under the circumstances, as nearly an accurate result as possible.

We are unable to see any error, nor was any pointed out to us. In such case there is no alternative but to affirm the decree.

[Decided July 17, 1893; rehearing denied August 2, 1893.]

RECTOR OF ST. DAVID'S v. WOOD.

[S. C. 34 Pac. Rep. 18.]

SPECIFIC PERFORMANCE—BUILDING CONTRACTS.—Although specific performance of a building contract will rarely be enforced, a contract agreeing to furnish stone of a peculiar kind, color, quality, and texture which cannot be procured elsewhere, to erect the walls, will be so far enforced as to require the contractor to permit the owner to take stone sufficient to erect the building, and to use derricks erected at the quarry for hoisting necessary to enable such stone to be taken out, where a large portion of the building has been erected, the contractor is insolvent and unable to complete his contract, and he has received nearly the whole consideration therefor, and it will be necessary if such stone is not furnished to rebuild the structure, or mar its effect by the use of other stone.

Multnomah County: LOYAL B. STEARNS, Judge.

Suit by the rector, wardens, and vestrymen of the Parish of St. David's, a corporation, against Frank Wood, and Virgil E. Watters, the recorder of conveyances of Benton County, Oregon, to enforce the specific performance of a written contract under seal. The facts show that the plaintiff is the owner of certain real property in Portland, Oregon, upon which it is desired to erect a church building; that the defendant Frank Wood is the owner of a stone quarry in Benton County, Oregon, and that on the sixteenth of May, 1892, the parties entered into said contract whereby the defendant agreed to furnish the necessary stone from his quarry, to dress, transport, cut, and lay the same in the walls of said building, furnish other necessary

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material, perform the mason work, and complete the same within one hundred working days from the fifth of June, 1892, for the sum of one hundred and sixty-five thousand dollars, payable from time to time as the work progressed, with the express agreement that plaintiff might withhold twenty-five per cent of the amount found due upon the certificate of the architect, until thirty days after the full completion of the contract, and to secure the faithful performance of the conditions thereof he executed and delivered to plaintiff a bond in the sum of four thousand dollars. Plaintiff alleges that it duly performed all the conditions of said contract, paid defendant more than sixteen thousand two hundred dollars thereon, although not more than two thirds of the stonework has been done; that the defendant has ceased to work thereon; that the stone from said quarry is of a peculiar color and quality, and that plaintiff is unable to complete said church in a suitable manner with stone from any other known source; that after the construction of said church was commenced, the defendant executed a mortgage on said quarry to secure a preëxisting debt of three thousand dollars; that there are other outstanding claims against the defendant on account of said church building; that liens have been filed thereon, and that defendant is insolvent; that unless the defendant is required to furnish the stone necessary to complete said building, or if plaintiff is compelled to purchase the same, it will require the expenditure of from six to eleven thousand dollars more than the amount of said bond; that plaintiff has paid the cost of quarrying, transporting, and dressing a quantity of stone from said quarry which defendant is seeking to remove without plaintiff's consent; and that he is also endeavoring to sell and convey said quarry, and refuses to perform his said contract; that the defendant Virgil E. Watters is the recorder of conveyances of Benton County and custodian of the records thereof, and that if any mortgage or other conveyance of

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said quarry or of the stone therein, or that was taken therefrom for plaintiff's use, be made by the defendant and recorded in said county, it would cause irreparable damage to the plaintiff for which it would have no adequate remedy at law. The plaintiff prayed that said contract might be specifically performed, and the defendant ordered to furnish the stone and mason work, as therein required, or that if he could not perform the contract, that he be compelled to furnish the plaintiff the necessary stone from said quarry for the completion of said building free of charge, and that he be restrained from encumbering, conveying, or interfering with the premises on which the quarry is situated, or with any stone therein or taken therefrom for plaintiff's use, and that the recorder of conveyances be enjoined from receiving, filing, or recording any mortgage, deed, or other conveyance of the said premises, and for general relief.

A temporary injunction was issued as prayed for in the complaint. The defendant Virgil E. Watters made default, but the defendant Frank Wood demurred to the complaint, alleging as ground thereof that the court had no jurisdiction to compel the performance of the contract to build, or the required manual service, or to compel the defendant to furnish the stone free of charge; that there is a defect of parties in this, that one Virgil E. Watters, a mere ministerial officer, who has no interest in the subject matter of the suit, and who is not shown to have done, or threatened to do, any act tending to render any decree ineffectual, is joined as a defendant; that two causes of suit are improperly joined, viz., to compel a specific performance, and to convert the defendant Wood into a trustee of his own property for plaintiff's benefit; and that said complaint does not state facts sufficient to constitute a cause of suit. The court overruled this demurrer, and the defendant Frank Wood refusing to further answer or plead, it was decreed that the said written contract be

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specifically performed or enforced to the extent that said Frank Wood be required to furnish the stone from his quarry necessary to fully carry out and complete said contract, and that the plaintiff by its officers, agents, and employes be authorized and permitted to enter upon the premises of defendant Frank Wood, and quarry in such manner as is or may be usual, or customary, the stone necessary to fully complete said church building, and to remove a sufficient quantity thereof from said quarry for that purpose; that plaintiff be permitted to use the defendant Wood's derricks at the quarry and at the church building in quarrying, transporting, and raising said stone, until the further order of the court, from which decree the defendant Wood appeals. Affirmed.

John W. Whalley, and Reuben S. Strahan, (Martin L. Pipes on the brief), for Appellant.

A brief consideration of one or two matters will clearly show how utterly without equity the bill is, and will at the same time point out the absolute incapacity of a court of chancery to deal with the questions involved without violating the rudimentary principles on which its power is founded, and will prove the remedy, if any, to be solely at law. The defendant is wholly irresponsible and insolvent. He must eat whilst getting out one thousand two hundred and fifty tons, and work hard for a very long time to do it. Who will supply him with grub, what blacksmith mend and sharpen the tools? nay, who will supply the tools, furnish the powder, fuse, and everything necessary for quarrying? The whole thing ends in a *reductio ad absurdum*. But even if this difficulty were removed, another remains. The quarry is mortgaged, the stone in place is realty, its removal by mortgagor as against mortgagee, waste, and the latter on the attempt of Wood to comply with an order of this court to furnish stone, would undoubtedly have a right to enjoin Wood

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from rendering the security less valuable, and to restrain waste. Where then would Wood be? In contempt if he did not furnish stone, in contempt if he did.

“You shall and you shan’t,
You will and you won’t;
If you do you’ll be damned;
You’ll be damned if you don’t.”

Some early English authorities may be found where courts of equity have enforced the specific performance of building contracts, but the rule is now settled the other way: *Paxton v. Newbon*, 2 Sm. & Gif. 437; *Kay v. Johnson*, 2 H. & M. 118; *Wertley v. Westminster B. C. Co.* L. R. 9 Eq. 538; *Norry v. Jackson*, 2 J. & H. 319; *Errington v. Ayneley*, 2 Bro. C. C. 343; *Ross v. U. P. R. R. Co.* 1 Woolw. 26; *Martin v. Hally*, 61 Mo. 196; *Beck v. Allison*, 56 N. Y. 367; *Seymore v. Delanay*, 15 Am. Dec. 270; *Grundy v. Edwards*, 23 Am. Dec. 409; *Whitaker v. Vanschoiack*, 5 Or. 113.

In all cases where it is clearly inequitable to grant specific performance the court will refuse it: *Munch v. Shovel*, 37 Mich. 166; *St. Paul Div. v. Brown*, 9 Minn. 157; *Snell v. Mitchell*, 65 Maine, 48; *Quinn v. Roath*, 33 Conn. 16; *Willard v. Taylor*, 8 Wall. 557; *Bogan v. Daughdrill*, 51 Ala. 312; *Daniel v. Frasier*, 40 Miss. 507; *O'Brien v. Pents*, 48 Md. 562.

Samuel H. Gruber, for Respondents.

Where a specific performance of a contract will alone answer the purpose of justice, a court of equity will enforce it: *Stuyvesant v. Mayor of New York*, 11 Paige, Ch. 414; *Waterman on Specific Performance* (Ed. 1881), §17; *Preston National Bank v. Geo. T. Smith, M. & P. Co.* 48 Mich. 364 (47 N. W. 502). And such specific performance may be enforced in equity, without regard to the character of

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the property involved: *Duff v. Fisher*, 15 Cal. 376; *Waterman on Specific Performance* (Ed. 1881), § 16; *Johnson v. Rickett*, 5 Cal. 218, 219; *Clark v. Flint*, 22 Pick. 231; *Sullivan v. Fink*, 1 Md. Ch. 59; *Lloyd v. Wheatley*, 2 Jones' Eq. 267; *Hoy v. Hansborough*, 1 Freem. Ch. 533.

When it is ascertained that the contract is founded on a valuable consideration, its mutual enforcement *in specie*, as in this case, is necessary owing to the unpracticability of giving to the new bonds a true valuation in money, and the contract is certain, unambiguous, and reasonable, then the remedy ripens into a right: *Parker v. Wray*, 45 Fed. Rep. 716; *Adams v. Messenger* (Mass.), 17 N. East. 491-494; *Chance v. Beal*, 20 Ga. 143; *Rogers v. Saunders*, 16 Me. 92; *Hopper v. Hopper*, 16 N. J. Eq. 147; *St. Paul Div. v. Brown*, 9 Minn. 157.

Where an award of damages will not put a party in a situation as beneficial to him as if the agreement were specifically performed, equity will enforce the performance: *Phyfe v. Wardell*, 2 Edw. Ch. 47 (6 L. Coöp. Ed. 304); *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422, 480, 494; *Blanchard v. Detroit L. & M. Co.* 31 Mich. 43; *McGarvey v. Hall*, 23 Cal. 140; *Somerby v. Bunting*, 118 Mass. 279; *Bogan v. Daughdrill*, 51 Ala. 312; *Willard v. Taylor*, 75 U. S. (8 Wall. 557), 19 L. Coöp. Ed. 501.

Agreements for the assignment of a patent, and for the delivery of chattels, which can be supplied by the vendors alone, and for renewals of leases are among those, which will be specifically enforced, on the ground, that otherwise irreparable injury or damage may be inflicted: *Hull v. Petral*, 45 Fed. Rep. 94; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86; *N. Y. Co. v. Union & Co.* 32 Fed. Rep. 783; *Penn. R. R. Co. v. St. Louis & Co.* 118, U. S. 298; *Adams v. Messenger*, 147 Mass. 185 (17 N. E. 491); *Reeses' Appeal*, 122 Pa. St. 392 (15 Atl. 807); *Waterman on Specific Performance*, §§ 17, 18, 21, 30, 31; *Frey on Specific Perform-*

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ance, § 33; *Blackmer v. Stone* (Ark.), 1 S. W. 693; *Parker v. Wray*, Fed. Rep. 716.

In special instances where the circumstances are peculiar or extraordinary either as respects the property, as where it possesses some unique or special value, or as to the situation of the parties, where an action for damages will not afford an adequate remedy. Equity may be invoked for a specific performance respecting personal property: *N. Y. Paper Bag Mfg. Co. v. Union Paper Bag Co.* 32 Fed. Rep. 783, 786; *Diamond State Iron Co. v. Todd* (Del.), 14 Atl. Rep. 24, 35; *Gotschalk v. Stein* (Md.), 13 Atl. Rep. 625, 626; *Eckstein v. Downing*, 9 Atl. Rep. 626; *Coffee v. Middlesex R. Co.* (Mass.), 16 N. E. 34; *Mechanics' Bank v. Seton*, 1 Peters, 299; *Johnson v. Brooke*, 93 N. Y. 337, 343; *Adams v. Messenger* (Mass.), 17 N. E. 491, 494; 3 Parsons on Contracts, 331, 332; Waterman on Specific Performance (Ed. 1881), §§ 18, 19; *Rothholz v. Schwartz*, (N. J.) 19 Atl. 312; *Angus v. Robinson* (Vt.), 19 Atl. 993; *Conn v. Mitchell*, 2 West Rep. 62 (115 Ill. 124); *Baumgardner v. Leavitt*, 12 L. R. A. 776.

MR. JUSTICE MOORE delivered the opinion of the court:

The specific performance of a building contract will rarely be enforced (Pomeroy, Specific Performance, § 23) upon the theory, as announced by Sir Lord KENYON, master of the rolls, in *Errington v. Ainsley*, 2 Brown, Ch. 341, "that if one person would not build, another might be found who would," and for the reason given by Lord THURLOW in *Lucas v. Commerford*, 3 Brown, Ch. 166, "that the court could not undertake to superintend the construction of a building." Such contracts have in some instances been enforced, but they were exceptions to the general rule, and are clearly stated by Mr. Justice MILLER in *Ross v. U. P. R. R. Co.* 1 Woolw. 26, as follows: "(1) In each case the building was to be done upon the land of

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the person who agreed to do it. (2) The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already by such conveyance on his part executed the contract. (3) In all of them the building was in some way essential to the use, or contributory to the value, of the adjoining land belonging to the plaintiff."

The prayer of the complaint is for the specific performance of the building contract, provided it could be granted. The decree, however, does not fully comply with the prayer, if it had there might have been just reason for its reversal. The record shows that the stone which defendant agreed to furnish is of a peculiar kind, color, quality, and texture, and that no other stone of like character can be procured; that he had furnished enough of such stone to build about two thirds of the walls, and if plaintiff cannot procure a sufficient quantity of the same kind to complete the work, it will be necessary to use other stone and thus destroy the beauty and harmony of its building, or the walls must be taken down and rebuilt with other stone; that defendant is insolvent, and therefore unable to complete his contract, although he has received nearly the whole consideration therefor. Under this state of facts, can a court of equity decree a partial performance, so as to carry out as near as possible the original intent of the parties? The contract was to furnish the stone and other material, and erect the walls. The defendant's pecuniary condition precludes a specific performance of that part of his contract which required him to furnish other necessary material and do the labor, if such a decree were possible (Pomeroy, Specific Performance § 293); but if he be incapacitated from performing it in the precise terms, the court will, if it is possible, decree a specific execution according to its substance, by making such variation from unessen-

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tial particulars as the circumstances of the case require or permit: *Idem*, § 297.

Courts will not generally decree the specific performance of a contract to deliver personal property (Waterman, Specific Performance, § 16), and yet it was held in *Hapgood v. Rosenstock*, 23 Fed. Rep. 86, that "agreements for the assignment of a patent, and for the delivery of chattels which can be supplied by the vendor alone, are among those which will be specifically enforced." This decision was approved by the supreme court of Massachusetts in *Adams v. Messenger*, 147 Mass. 185 (17 N. E. 491). Applying these rules to the case at bar, the defendant has stone which cannot be procured from any other quarry, and plaintiff must use it or the harmony of its building will be marred, and since the defendant cannot be required to do that which his pecuniary condition forbids, he can be negatively required to specifically perform the contract by compelling him to allow the plaintiff to take the necessary stone to complete the building. It is a fundamental principle that equity will not decree the specific performance of a contract unless the undertaking to be enforced is founded upon a valuable consideration moving from the party in whose behalf the performance is sought: Pomeroy, Specific Performance, § 57. The contract which is sought to be enforced is under seal, and this constitutes primary evidence of a consideration: Hill's Code, § 753. It is sufficient, however, if some profit is to inure to the promisor, or some detriment to be sustained by the promisee: Waterman, Specific Performance, § 188. The record shows that the contract was awarded to the defendant, and that plaintiff has voluntarily advanced to him a large sum in excess of the amount it would have been compelled to pay under the contract as the work advanced. The defendant having received the payment, ought not now to complain or say there is no consideration for the stone necessary to complete the building. The

plaintiff has already paid for such stone, and the defendant ought not to object to its taking the necessary quantity, since the defendant's pecuniary condition will not permit him to supply it.

The record further shows that defendant has some derricks which he uses at his quarry and at the church building for hoisting stone, which the decree provides the plaintiff may use. The stone cannot be taken from the quarry, loaded upon cars or placed in the building, without the use of these or similar machines; and, since the defendant has them, he is contributing no more than his share when required to permit the use of them by plaintiff. Such use, however, does not mean their destruction, and they must be returned in as good condition as when received, the usual wear thereof excepted. Because the contract has proved unprofitable to the defendant is no reason it should not be enforced as far as practicable. It was fairly entered into, and each party believed it could be completed for the consideration agreed upon, and the court having granted such relief as was equitable under the circumstances of the case, its decree should be affirmed.

The recorder of conveyances of Benton County is enjoined from receiving for record any conveyance of, or incumbrance upon, the quarry premises. An injunction will not usually lie against a ministerial officer to restrain him from doing that which the law requires as a part of his duty, but since he has made default it must be presumed that he acquiesces in the decree. **AFFIRMED.**

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[Argued July 18, 1893; decided July 24, 1893.]

BITTING v. DOUGLAS COUNTY.

[S. C. 33 Pac. Rep. 981.]

COUNTY ROADS—NOTICE—JURISDICTION—CODE, § 4063.—Under section 4063, Hill's Code, providing that notice to establish a county road shall be served by posting it in several public places for thirty days, the notice must name with reasonable certainty the time when the notice will be presented, and the fact that actual knowledge of the intended proceeding has come to the knowledge of a person to be affected cannot aid a defective notice. An undated notice is insufficient to confer jurisdiction in a road proceeding.

Douglas County: J. C. FULLERTON, Judge.

Defendant appeals. Affirmed.

This is a special proceeding by C. H. Bitting, to review the action of the county court of Douglas County in the matter of changing a county road. The facts show that the notices posted by the petitioners were not dated, and that they failed to state when the next session of the county court of said county would be held; that on the fifth of May, 1890, a petition containing the names of fifty-eight persons was filed with the county clerk of said county, and J. H. Martin, one of the petitioners, made and filed his affidavit, from which it appears that said notices were posted in proper places on the fifth of April, 1890; that on the ninth of May, 1890, the proper undertaking was filed, but no mention is made in the record of said court of any continuance, nor was any action taken thereon until the ninth of July following, when the viewers and surveyor were appointed, who, after duly qualifying, met at the time and place designated in the order, viewed and surveyed the proposed route, and on the third of September, 1890, made and filed their report and plat of said survey; that on the eighth of the same month V. L. Arrington, C. H. Bitting, and K. A. Arrington filed claims

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for damages, and on the next day the said court appointed three householders to assess their respective damages. The assessors met at the time and place appointed and determined how much less valuable the lands of each claimant would be rendered by the proposed change, and made a report thereof. It does not appear from the record that more than two of said assessors ever qualified, though all joined in making said report, which recited that each was duly qualified. On said third day of September remonstrances containing the names of one hundred persons were filed against the proposed change, and on the next day J. H. Martin and B. B. Brockway, two of the petitioners, moved to strike the names of sixty-two persons from said remonstrance for the reason that twelve of them were not householders of said county, and fifty others because they did not reside in the vicinity of the proposed road; that two days thereafter, E. H. Bitting and W. Talkington, two of the remonstrators, moved to strike the names of forty-four persons from the petition for the reason that they did not reside in the vicinity of the proposed road. The record does not show what action was taken by the county court upon these motions to strike the names from the petition and remonstrance, but on the eighth of November, 1890, said court approved the report of the viewers, overruled the remonstrance, and declared the road changed as recommended by the viewers, ordered the damages paid, and the road opened as so changed.

C. H. Bitting, a claimant for damages, petitioned the circuit court for a writ of review, and assigned the following errors committed by the county court: "1. The said court erred and acted without jurisdiction in the matter of location of said road, for the reason that said petition for said road location fails to state that the petitioners reside in the vicinity where the said road was to be laid out, altered, or located. 2. That the said petition fails to describe any road sought to be located, by stating the beginning, ter-

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minal, and intermediate points thereof. 3. That the said petition does not ask for the laying out, alteration, or location of any county road. 4. That the said petition does not ask for the vacation or alteration of any county road. 5. That the record of the court fails to show that the order of the county court appointing viewers and surveyor was served upon the viewers or surveyor five days before the view, or that said order was served at all upon said viewers or surveyor. 6. That the notices claimed to have been posted in the vicinity of the road, and at the court-house door, failed to state the date when the said petition would be presented to the said court for the location of said road. 7. That the notices so posted were not dated. 8. That it appears from the petition and the proof of posting that the said petition and proof of posting the notices were filed with the clerk of said county on the seventh day of May, 1890; the same being the first day of the regular May, 1890, term of said court: but that no action was taken thereon by said court at said term, and no order made by the said court in relation thereto. 9. That said court acted without authority in considering the petition at the July, 1890, term of said court without making any order and entering the same upon the journal of said court, continuing the hearing of said petition to the said July term of said court. 10. That the assessors of damages appointed at the September term of court, 1890, to determine how much less valuable the premises of the plaintiff would be rendered by the opening of the said proposed road, did not qualify as by law required, and that the said court erred and acted without authority in accepting and acting upon their said report. 11. That the court erred in not dismissing the said proceedings for the location of said road, when it appears from the remonstrance against the location of the same that the majority of said householders residing in the vicinity of said proposed road remonstrated against the location thereof, as appears from the records of

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said proceedings. 12. That the said court erred and acted without authority and jurisdiction in making an order on the eighth day of November, 1890, at a regular term thereof, that the said road be declared a public highway, and that the supervisor open the same, and that the damages be assessed to your petitioner, the plaintiff herein, to be paid when the petitioners should complete a portion of said road in said order named." The necessary undertaking having been given, the circuit court, on the sixteenth of January, 1891, directed the writ to issue, making it returnable at the next term of said court; and at the trial the court found that there was error as stated in the writ; that the proceedings of the county court were irregular, and rendered a decree setting them aside, from which the defendant appeals. **AFFIRMED.**

William R. Willis, and J. W. Hamilton, for Appellant.

George M. Brown, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

In the examination of this record we shall only consider the sixth and seventh assignments of error, as we deem them decisive of the case. In proceedings to establish a county road, the petition is the complaint, and the notice is the process which gives the county court jurisdiction: *Jones v. Marion County*, 4 Or. 46. The advertisement is the process, and the posting in public places is the service: *Minard v. Douglas County*, 9 Or. 206. In *King v. Benton County*, 10 Or. 512, WALDO, J., says: "It is common sense that the notice should give full information of the intended proceeding." In *Vedder v. Marion County*, 22 Or. 264 (29 Pac. 619), the strictness of the rule adopted in the cases of *Minard v. Douglas County*, and *King v. Benton County*, is somewhat modified, but it was never intended to dispense with any of those requirements

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necessary to confer jurisdiction. The notice to establish a county road is served by posting at the place of holding the county court, and also in three public places in the vicinity of the proposed road: Hill's Code, § 4063. Such service is constructive, and in all cases rests upon the presumption that the party affected thereby has seen the notice: Wade on Notice, § 1029. It must on its face be so specific as to inform the householder inspecting it of the proceedings contemplated, and one of the principal objects in requiring such notice is to inform interested parties of the time and place, when and where his property will be affected by some proceeding. It should name the day, with reasonable certainty, upon which the defendant so served with process is required to appear and answer: *Idem*, § 1063. The fact that information of the intended proceeding has actually come to the knowledge of the defendant, cannot aid a defective notice: *Idem*, § 1030. The party affected by the notice need not seek other information to aid the defect or supply the omission of any material fact which it should contain. The notice in the case at bar is as follows: "Notice is hereby given that a petition will be presented to the county court of Douglas County at its next regular term for a change in a road now located, and described as follows." This notice is properly signed by the petitioners, but contains no date whatever. Could a person whose land would be affected by the location of a county road tell when the petition would be presented to the county court from reading such a notice? The law requires that the notice shall be advertised by posting thirty days previous to the presentation of the petition: Code, § 4063. No one could tell from the notice at what term of the court the petition would be presented. It is silent as to this necessary requirement, and did not give to the county court any jurisdiction to entertain the petition, and hence any action taken thereon is void. There are several other questions

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presented by the record, but since the county court never acquired jurisdiction, their examination would be useless.
AFFIRMED.

[Argued July 17, 1893; decided July 24, 1893.]

JONES v. GATES.

[S. C. 83 Pac. Rep. 989.]

24	411
29	198
24	411
30	214

1. **NOTICE—KNOWLEDGE—PUBLIC WRITINGS.**—Knowledge of a fact is always notice thereof, provided such knowledge be such as to prompt a reasonably prudent man to make inquiry which, when prosecuted, would lead him to discover the fact by which he would be affected. Idle rumors and vague suspicions are not enough, nor are general assertions made by strangers, or hearsay statements. Public writings, of course, are always notice, whether seen by the person to be affected or not.
2. **ESTOPPEL.**—One who advises another to purchase property without mentioning a vendor's lien which he claims thereon, is estopped from asserting it after the negotiations are completed, and the consideration paid.

Douglas County: **ROBERT S. BEAN**, Judge.

This is a suit by Isaac Jones against Henry Gates and John Rast to enforce a vendor's lien against certain real estate known as the Roseburg Mill Property, in Douglas County. The facts are that on the twenty-third of June, 1879, plaintiff was the owner in fee of the undivided one half of said property, which, at that date, in consideration of two thousand five hundred dollars, he conveyed to the defendant Henry Gates; that Gates, on the third of March, 1881, paid seven hundred and seventy-five dollars thereon, and on the eleventh of June, 1881, made another payment of eight hundred and ninety-one dollars and sixty-six cents; that on the fifth of October, 1886, plaintiff commenced an action in the circuit court of said county against Gates, to recover the remainder of the purchase price, and on the fifteenth of October, 1888, obtained a judgment therein for one thousand eight hundred and thirty-four dollars and eighty-four cents, and ninety dollars and eighty-five cents costs and disbursements; that

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on the fifteenth of January, 1887, while said action was pending, the defendant Gates, in consideration of five thousand dollars, conveyed said premises by a warranty deed to the defendant John Rast, subject to a mortgage of two thousand dollars in favor of Robert and Thomas R. Boggess; that at the date of said conveyance Henry Gates and plaintiff, as co-partners, were indebted to Rast in the sum of about one thousand five hundred dollars, which was credited on the purchase, and Rast paid Gates the balance of said purchase price, except the amount due on said mortgage, which was paid on the twenty-second of November, 1889; that on the twelfth of November, 1889, an execution was issued on plaintiff's judgment, which was returned by the sheriff with the endorsement thereon that no property of the defendant Gates could be found. Plaintiff alleges in his complaint herein that Rast purchased said property with full knowledge that Gates had not paid the purchase price, and that said action was pending to recover it. The defendant Rast denies these allegations, and for a separate defense alleges that at the time of the conveyance to him Gates was the owner and in possession of said premises, and that he paid a full consideration therefor; that prior to his purchase from Gates plaintiff advised him to buy said property, and said it was cheap at five thousand dollars, and that if he had the money he would purchase it himself at that price; that he acted upon this advice and purchased the property; that he paid all demands against him on account of said purchase, including said mortgage, and made improvements of the value of one thousand five hundred dollars on the property since said purchase, without notice of plaintiff's claim, and insists that plaintiff ought now to be estopped from claiming a lien thereon.

The reply denied the allegations of the answer, and the cause being at issue was referred to G. A. Taylor, Esq., to take the testimony, and the court, upon the report thereof,

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rendered a decree dismissing the complaint, from which the plaintiff appeals. Affirmed.

William R. Willis, for Appellant.

J. W. Hamilton (*Lane & Lane* on the brief), for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

Assuming, without deciding, that a vendor's lien exists in this state, has the plaintiff by clear and convincing proof established his right thereto? Before plaintiff's lien can be decreed it must appear that Rast was not an innocent purchaser; that he did not pay a valuable consideration, or that he had notice of plaintiff's claim prior to said conveyance, or to the payment of the consideration. The evidence shows that Rast paid five thousand dollars for the property, which was a full consideration therefor; that Gates was in possession at the time of the conveyance, and executed a warranty deed therefor; and that, as Rast testified, the payment was made before he received any notice of plaintiff's claim. This would make Rast an innocent purchaser for a valuable consideration.

1. Did he have any notice of plaintiff's claim prior to his purchase, or to the payment of the consideration? A public writing is presumed to give notice of the contents thereof, whether seen by the party to be affected or not, but knowledge is information acquired by other means. Actual knowledge of the existence of a fact is equivalent to notice thereof. This knowledge must be such as to prompt any reasonable prudent man to make inquiry, which, if prosecuted, would lead him to discover the fact with which he would be affected. Idle rumors and vague suspicions will not answer, nor will general assertions made by strangers to the title, and resting on hearsay, be sufficient: *Williams v. Miller*, 16 Iowa, 111. No attach-

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ment was issued in the action brought by the plaintiff against Gates, and hence there could be no legal notice to Rast in that proceeding. The decision, then, must turn upon the question whether Rast had such knowledge of plaintiff's claim against Gates as would cause a reasonable, prudent man to inquire into the existence of the fact. The plaintiff testified that he said to Rast at the time he commenced his action against Gates: "If I get a judgment against him I consider my property holding until it was paid for." He also testified that he referred to the property in question, and said that at the time he made the statement he intended to hold this property. The defendant Rast testified that plaintiff told him at that time he intended to commence a suit against Gates, but he understood it to be for the settlement of accounts between them as partners, and that he never understood it to be for the purchase price of the land; and that he had paid the full consideration before he ever knew that plaintiff claimed any lien upon the property. There are circumstances shown by the record which appear to corroborate this theory. Rast testified that when he was negotiating for the purchase of the property, plaintiff advised him to buy it at the price asked by Gates; that after he had made the purchase, and paid the consideration, plaintiff then told him he claimed a lien upon the premises, and Rast asked him why he had not told him of his claim at the time he was negotiating with Gates, and plaintiff said he did not think of it. Thomas Criteser testified that he was present, and heard plaintiff advise Rast to buy the property, and that he did not at that time tell Rast he claimed any lien thereon. We must conclude from this that Rast did not have such knowledge as would lead a reasonably prudent man to make inquiry concerning plaintiff's claim.

2. The defendant Rast has alleged that plaintiff advised him to buy the property without notifying him of his lien, and for that reason should now be estopped from

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asserting it. The plaintiff knew about the negotiations for the purchase of the property; Rast told him he considered Gates asked too much for it, and with knowledge of these facts he advised Rast to buy it at the price demanded by Gates, without telling him anything about his claim. This was the time for the plaintiff to speak. He knew that Rast was about to purchase the property, and by remaining silent, when he should have spoken, it would seem to be inequitable to allow his claim to a lien after the negotiations were consummated and the consideration paid. Plaintiff permitted nearly ten years to run against his claim before he attempted to assert it. He allowed Gates to use the property as his own for more than seven years before it was conveyed to Rast, and thereby enabled him to acquire a credit he probably would not otherwise have obtained; and then, when the statute of limitations was about run, he commenced his suit to foreclose a secret lien. The tendency of modern legislation and decisions is strongly opposed to the creation or enforcement of secret liens. A registry system has been wisely provided to give notice of claims to real property, and conceding, for the sake of the argument, that a vendor's lien exists in this state, the plaintiff, by his delay in commencing this suit, has permitted others to deal with Gates in relation to this property in a manner which would prejudice their rights if such a stale claim could be enforced. We are satisfied that no sufficient evidence has been offered to establish the alleged lien and the decree of the court below is **AFFIRMED.**

BEAN, J., having tried the case in the court below took no part herein.

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[Argued July 19, 1893; decided July 24, 1893.]

HILL v. HILL.

[S. C. 33 Pac. 809.]

1. **DIVORCE—EVIDENCE.**—Evidence in a suit for divorce that defendant frequently charged plaintiff with unchastity, without stating the times, places, persons, or circumstances, is too indefinite and uncertain to warrant a decree.
2. **DIVORCE—PLEADING CONDONATION.**—In a divorce suit defendant may take advantage of the defense of condonation without pleading it.
3. **DIVORCE—ADMISSIONS IN PLEADINGS.**—Admissions in an answer in divorce proceedings do not warrant a decree, but plaintiff must establish a good cause of suit independently of them.

Douglas County: J. COREY FULLERTON, Judge.

Suit by Lucy J. Hill for a divorce from W. J. Hill. There was a decree for plaintiff and defendant appeals. Reversed.

E. O. Potter, for Appellant.

L. Bilyeu, and *A. C. Woodcock*, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

This is a suit for divorce on the ground of cruel and inhuman treatment. The complaint charges "that defendant has been jealous of plaintiff without cause, and has for the past three years continued to be jealous of plaintiff, and has frequently accused the plaintiff falsely, and without cause, of being guilty of unchastity, and of having committed adultery, by saying to plaintiff, that 'you [plaintiff] have been having sexual intercourse with other men besides me' [defendant], and that said defendant made such accusations frequently during February, 1891. The persons meant by defendant, plaintiff cannot now state. That each, all, and every of said charges were false and untrue in fact, and defendant knew the

same, and made them to vex and annoy the plaintiff." It is doubtful whether this allegation is sufficiently definite and certain to constitute a cause of suit, but we pass that question.

1. The record discloses that plaintiff and defendant were married in this state on the tenth day of February, 1878, and continued to live together as husband and wife until some time in 1888, when the defendant, having met with financial reverses, went to Kansas, with plaintiff's consent, to seek a new location, with the understanding that he should send for his family as soon as he could provide a home for them. The only ground for the divorce alleged is that of imputation of a want of chastity, and the only evidence in the record tending in any way to support the charge is the testimony of plaintiff, given in response to leading interrogatories, and is as follows: "Q. How has defendant treated you during your married life? A. He has not treated me very well for the last six years. He has been jealous and accused me of not being true to him. He thought I was too free with others and allowed them privileges I hadn't ought to. Q. Did he ever accuse you at any time of having had sexual intercourse with other men? A. He did, frequently. Q. Did he have any reason for so accusing you? A. He never. Q. You may state what effect the action of defendant toward you had on you as to your happiness while living with him? A. It has made me very miserable, and has impaired my health. It has insulted me and wounded my feelings." This testimony is flatly contradicted by the defendant, but even if uncontradicted, is clearly too indefinite and uncertain as to time, place, persons, and circumstances to entitle her to a divorce.

2. The accusation of adultery, so far as this testimony discloses, if made at all, may have been made at any time during the married life of the parties, and have been fully condoned by subsequent cohabitation, and if this be so

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the plaintiff is not entitled to a decree of divorce, although the defendant has not pleaded the condonation: *Stewart on Marriage and Divorce*, § 311; 2 *Bishop on Marriage, Divorce, and Separation*, § 631; *North v. North*, 5 Mass. 320.

3. It is claimed that the defendant by his answer admits the charge, and that such admission should be taken against him. It is true the answer does technically admit that defendant accused the plaintiff of the crime of adultery, but this admission is only the result of an imperfect denial, and evidently not intentional on the part of the defendant; but if it was otherwise, or no answer whatever had been filed, the plaintiff must still make out her case before she is entitled to a decree. As was said by LORD, J., "It is our duty to remember that the contract of marriage, unlike other contracts, the state is specially interested in preserving unbroken, and that the contracting parties cannot annul it, nor the court, except for the causes specified in the statute, and only then when satisfactory evidence that such cause or causes exist": *Wheeler v. Wheeler*, 18 Or. 262. The courts regard the marriage contract with peculiar favor, and will not dissolve it upon the mere disagreement of the parties under it, or their failure to live happily together: *Adams v. Adams*, 12 Or. 176; *True v. True*, 6 Minn. 436.

Looking at this entire record, we are of the opinion that plaintiff has not proven a case entitling her to a divorce, and the decree of the court below must be REVERSED and the COMPLAINT DISMISSED.

[Argued July 13, 1893; decided July 24, 1893.]

CRANE v. JONES.

[S. C. 33 Pac. Rep. 269.]

24	419
135	262

LIMITATION OF ACTIONS—CODE, §§ 16, 23.—The limitation imposed by section 16 of Hill's Code, when considered in connection with section 23, does not apply to a defendant who was a non-resident of the state at the time the cause of action arose. *McCormick v. Blanchard*, 7 Or. 282, approved and followed.

Marion County: GEO. H. BURNETT, Judge.

This is an action by M. L. Crane against C. L. Jones as endorser of a promissory note for one hundred and fifty dollars, dated the twenty-ninth of April, 1879, executed and made payable in the province of Ontario, Canada, due one month after date. The complaint alleges that soon after the maturity of the note the defendant came to the United States, and for more than nine years prior to the commencement of this action was concealed within the State of Oregon, under an assumed name, and his whereabouts unknown to the plaintiff until a short time before this action was commenced. A demurrer to the complaint was sustained by the court below on the ground that the action is barred by the statute of limitations, and plaintiff appeals. Affirmed.

Wm. H. Holmes (B. F. Bonham on the brief), for Appellant.

The only question for decision is whether sufficient is alleged to show that the defendant had "concealed" himself in this state, so as to bring him within the exception of the statute, section 16, Hill's Code. We maintain that it does, as that section has been construed by this court and the supreme courts of Kansas and Missouri: *Rhotan v. Mendenhall*, 17 Or. 199; *Harper v. Pope*, 9 Mo. 402; *Frey v. Aultman*, 30 Kan. 181; Wood on Limitations, § 249. Un-

 Points decided.

der these authorities, we think the fact of the defendant having assumed a false name, under which he was known for nine years in Oregon, was an affirmative act on his part which obscured his identity and amounted to a concealment within the meaning of the law.

John W. Whalley, and Granville G. Ames (R. S. Strahan, and M. L. Pipes on the brief), for Respondent.

PER CURIAM.—The only question for decision is, whether section 16 of Hill's Code is designed to apply to a defendant who was a non-resident of the state at the time the cause of action arose. This question was considered in *McCormick v. Blanchard*, 7 Or. 232, and it was there held that section 16, when considered in connection with section 26, should be construed to apply to residents only, and this is decisive of the question now presented unless that case is to be overruled, and this, as at present advised, we are not prepared to do. Judgment AFFIRMED.

[Argued June 26, 1893; decided July 17, 1893.]

UPTON v. HUME.

[S. C. 23 Pac. Rep. 810; 21 L. R. A. 493.]

1. LIBEL.—CANDIDATE FOR OFFICE*—MALICE—PRIVILEGE.—The fitness and qualification of a candidate for a public office may be subjected to the closest scrutiny and investigation, and charges affecting the fitness of such a candidate will not be actionable without proof of express malice; but when a crime is falsely imputed to a candidate, the utterance is actionable *per se*, the law implying malice. Such charges are in no respect privileged, and can be justified only by proof of their truth.
2. LIBEL.—PRIVILEGE OF NEWSPAPER PUBLISHERS*—FREEDOM OF THE PRESS.—The idea that the "freedom of the press," guaranteed by the constitu-

*NOTE.—In connection with the above presentation of the law regarding newspaper libels of candidates for public office, see *Belknap v. Ball*, 83 Mich. 583 (S. C. with notes, 11 L. R. A. 72 and 21 Am. St. Rep. 622), and also a very scholarly article on the general subject of Newspaper Libel attached to the case of *McAllister v. Detroit Free Press Co.* 15 Am. St. Rep. 333 (S. C. 76 Mich. 338).—REPORTER.

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tion, gives newspaper proprietors a privilege to publish with impunity charges for which others would be held responsible, is a very erroneous one; such persons have no more immunity from liability for libelous publications than other citizens. The publisher of a false and defamatory charge must always answer in damages to the injured party.

3. **JUSTIFICATION OF LIBEL—MITIGATION OF DAMAGES.**—The fact that a defamatory publication was copied from another newspaper in the honest belief that it was true is not a justification, although it may go in mitigation of damages.
4. **LIBEL—EVIDENCE OF OTHER CHARGES—MALICE—DAMAGES.**—In an action for libel, actionable words spoken or published on other occasions than the one charged, can be given in evidence as tending to show express malice and to enhance the damages, when they impute the same crime, or are a renewal of the original charge, but not otherwise.
5. **FAILURE TO PROVE TRUTH OF LIBELOUS CHARGE—JUSTIFICATION—MALICE—CODE, § 91.**—The fact that a defendant in a libel action has failed to prove his plea of the truth of the charge, is not necessarily to be considered as evidence of malice and in aggravation of damages; it is for the jury to decide from all the evidence, and from the spirit of the defense, whether the plea was an honest one, or was simply an excuse to repeat the original charge.

Curry County: J. C. FULLERTON, Judge.

The plaintiff J. H. Upton sued R. D. Hume upon a charge of libel, in publishing in the Gold Beach Gazette, a newspaper owned and published by him, and circulated in the counties of Coos and Curry, in this state, certain articles concerning the plaintiff, containing, among other things, the following language, alleged to be false and defamatory: "He [meaning the plaintiff] has already acquired the reputation of being a loathsome, venomous thing, without shame; a man without a spark of manhood, a betrayer of his party, a citizen whose word is not worth a straw, a vile and cowardly slanderer, an infamous scoundrel, and a perjured villian." "No, sir; you [meaning the plaintiff] did this simply for personal feeling and spite. You did so because Captain Tichenor had publicly called you, to your face, a perjurer and a thief." "This, sir, was the worst of perjury, for by this, your false swearing, you deceived the court, and was the cause of granting

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a divorce illegally. Deny this if you dare. The proof can be produced with little effort. We could recount many more of your ways that are dark, J. H. Upton, but we think the above will suffice for the present."

The defendant by his answer admits the publication, but pleads (1) the truth in justification; and, (2) as a matter of inducement, explanation, and justification, that at the time of the publication the plaintiff was a candidate for the office of joint representative for Coos and Curry Counties in the legislature, and that the articles complained of were only a re-publication of unretracted charges published in 1884, by one Walter Sutton, who, at the time of the publication complained of, was publishing a paper called the Port Orford Tribune, and advocating therein the election of plaintiff, and abusing the defendant who was supporting and advocating the election of plaintiff's opponent; that when said articles were published by defendant, he had sufficient cause to believe, and did believe, that the charges therein contained were true, and that the plaintiff was an unfit person for the position to which he aspired, and so believing, published the same in good faith, and without malice against the plaintiff, but for the sole purpose of advising the voters of Coos and Curry Counties as to the true character of plaintiff, and the inconsistency of Sutton. The trial resulted in a verdict and judgment in favor of plaintiff for the sum of five hundred dollars, from which the defendant appeals, assigning error in the admission of testimony and in giving and refusing certain instructions. Reversed.

S. H. Hazard, for Appellant.

1. Defendant's motion for a nonsuit should have been sustained, for the reason therein stated. The admissions made by the pleadings show that the occasion justified the publication as made, unless the plaintiff introduced evidence showing, or tending to show, express malice on the

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part of the defendant in the making of the publication. And we insist the evidence offered by plaintiff entirely fails to show any malice on the part of appellant, but on the contrary that the defendant had sufficient reason to believe, and did believe, that the matter published by him was true. As respects publications concerning candidates for office, the same rules apply to them as to communications made concerning candidates for employment generally, or as applied to those who in a measure challenge criticism by appearing as authors, actors, or in fact any role which appeals to the public and gives occasion for criticism: Townshend on Slander and Libel, §§ 247, 245, 254; *Briggs v. Garrett*, 111 Penn. St. 404 (56 Am. Rep. 274); *Neeb v. Hope*, 111 Penn. St. 145; *State v. Balch*, 31 Kan. 465 (2 Pac. Rep. 609); *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251 (14 N. W. Rep. 785); *Miner v. Post and Tribune Co.* 49 Mich. 358 (13 N. W. Rep. 773); *Crane v. Waters*, 10 Fed. Rep. 619; *Lewis v. Chapman*, 16 N. Y. 369; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby*, 46 N. Y. 427 (7 Am. Rep. 360); *Marks v. Baker*, 28 Minn. 162 (9 N. W. Rep. 678); *Palmer v. Concord*, 48 N. H. 211 (97 Am. Dec. 605); *Kent v. Bongartz*, 15 R. I. 72 (2 Am. St. Rep. 870); Cooley on Torts, 210, 217; 3 Lawson's Rights, Remedies, and Practice, §§ 1290, 1296; *Fresh v. Cutter*, 25 Am. St. 575 (73 Maryland, 87; 10 L. R. A. 67); *Rotholz v. Dunkle*, 26 Am. St. 432 (52 N. J. L. 438; 13 L. R. A. 655); *Gardemal v. McWilliams*, 26 Am. St. 195 (43 La. Ann. 454); *Rude v. Nass*, 24 Am. St. 717 (79 Wis. 321); *Fowles v. Bowen*, 30 N. Y. 20; *Bryan v. Collins*, 7 Am. St. 726 and note (111 N. Y. 143; 2 L. R. A. 129); *Chaffin v. Lynch*, 6 S. E. Rep. 474 (84 Va. 884); *Chaffin v. Lynch* (Va.), 1 S. E. Rep. 803; *Wieman v. Mabee*, 8 N. W. Rep. 71 (45 Mich. 484; 40 Am. Rep. 477); *Edwards v. Chandler*, 14 Mich. 471 (90 Am. Dec. 249); *Missouri Pac. Ry. Co. v. Richmond*, 15 Am. St. 794 (73 Tex. 568; 4 L. R. A. 280).

To recover in an action of libel where the communi-

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cation is privileged, the plaintiff must prove affirmatively not only the falsehood of the communication, but that it was published with express malice: *Edwards v. Chandler*, 90 Am. Dec. 249 (14 Mich. 471); *Lewis v. Chapman*, 16 N. Y. 369; Townshend on Slander and Libel, §§ 392, 209; Newal on Defamation, § 23; *Fresh v. Cutter*, 25 Am. St. 575 (72 Md. 87; 10 L. R. A. 67); *Gardemal v. McWilliams*, 26 Am. St. 195 (43 La. Ann. 454); *Gott v. Pulsifer*, 122 Mass. 235 (23 Am. Rep. 322); *Chaffin v. Lynch*, 6 S. E. Rep. 475; *Wieman v. Mabee*, 8 N. W. Rep. 71 (45 Mich. 484).

Justification from occasion, in action of slander, arises when an actionable communication is made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, legal, moral, or social, if made to a party having a corresponding interest or duty: *Fresh v. Cutter*, 25 Am. St. 575 (10 L. R. A. 67); *Rotholz v. Dunkle*, 26 Am. St. 432 (53 N. J. L. 438; 13 L. R. A. 655); *Bryan v. Collins*, 7 Am. St. 726 and note (111 N. Y. 143; 2 L. R. A. 129); 3 Lawson's Rights, Remedies, and Practice, § 1296; *Van Wick v. Aspinwall*, 17 N. Y. 190.

If the jury believed from the evidence that the defendant had sufficient reason to believe, and did believe, that the matter published by him was true, and so believing published the same only because he believed it his duty so to do, those facts would be conclusive evidence that the defendant was not actuated by actual malice, even if there was no question of privilege in the case: Townshend on Slander and Libel, § 409; *Edwards v. Kansas City Times*, 32 Fed. Rep. 813; *Fresh v. Cutter*, 25 Am. St. 575 (10 L. R. A. 67); *Rude v. Nass*, 24 Am. Dec. 717; *Gott v. Pulsifer*, 122 Mass. 239; *Crane v. Waters*, 10 Fed. Rep. 619.

2. The court instructed the jury that the fact that the articles republished by defendant had been formerly published as in answer alleged, was no defense to the action,

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and entirely failed to instruct the jury, that the same might be considered by them in mitigation of damages, and as tending to show that defendant believed the publication to be true, which was clearly error: *Davis v. Sladden*, 17 Or. 267, and cases cited.

3. We insist that the better opinion is, that evidence of a charge of a different nature, and at a different time from that alleged in the complaint, is inadmissible to prove malice, or for any purpose: *Howard v. Sexton*, 4 N. Y. 157; *Frazier v. McCloskey*, 60 N. Y. 337 (19 Am. Rep. 193); *Distin v. Rose*, 69 N. Y. 123; *Root v. Lowndes*, 6 Hill, 518 (41 Am. Dec. 762); *Townshend, Slander and Libel*, § 392, p. 654; *Philadelphia W. & B. R. Co. v. Quigley*, 62 U. S. (21 How. 202; 16 L. Ed. 73); *Keenholts v. Becker*, 3 Denio, 349; *Campbell v. Butts*, 3 N. Y. 173; *Bodwell v. Swan*, 3 Pick. 376; *Leonard v. Pope*, 27 Mich. 145.

4. Under the code the defendant may allege in his answer the truth of the charge in justification, and also facts tending to prove its truth in mitigation of damages, and although the evidence fails to prove the justification, he is entitled to have it submitted to the jury in mitigation of damages: *Hill's Code*, § 91; *Bisby v. Shaw*, 12 N. Y. 67; *Willover v. Hill*, 72 N. Y. 36; *Bliss on Code Pleading* (2d Ed.), §§ 359, 360.

When the defendant has plead the truth of the charge as a defense, and also matter in mitigation of damages showing, or tending to show, that defendant honestly believed the charge to be true, and that the defense was made in good faith, the mere fact that on the trial the defendant failed to prove that the charge made by him was true, is not, in itself, evidence of malice, and an instruction that it is, is clearly erroneous. It should be left to the jury to determine from the whole evidence, whether the defense was interposed in good faith, under the honest belief that it was true; or whether it was made in bad faith. In the former case it would not be evidence of

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malice, and in the latter it would: Bliss on Code Pleading, § 360; *Klinck v. Colby*, 46 N. Y. 427 (7 Am. Rep. 360; *Bisbey v. Shaw*, 12 N. Y. 67; *Distin v. Rose*, 69 N. Y. 122; Townshend on Slander and Libel, § 400; *Spooner v. Keeler*, 51 N. Y. 527; *Farmum v. Childs*, 66 Ill. 544; *Chamberlin v. Vance*, 51 Cal. 79; *Proctor v. Houghtaling*, 37 Mich. 41; *Rawsons v. Christian*, 49 Ga. 491; *Duval v. Davey*, 32 Ohio St. 604; 13 Am. and Eng. Enc. 401.

William M. Kaiser orally argued the case, and *J. M. Siglin* presented the following brief, for Respondent:—

1. A publication of and concerning a candidate for a public office, if it imputes crime, is libelous unless true. It is not a privileged communication: *Aldrich v. Press Printing Co.* 9 Minn. 133 (86 Am. Dec. 84); *Com. v. Clap*, 4 Mass. 163 (3 Am. Dec. 212); *Seely v. Blair*, Wright (Ohio) 358; *Com. v. Wardwell*, 136 Mass. 164; *Sweeney v. Baker*, 13 W. Va. 158 (31 Am. Rep. 757); *Hamilton v. Eno*, 81 N. Y. 116; *Usher v. Severance*, 20 Me. 9 (37 Am. Dec. 33); *Snyder v. Fulton*, 34 Md. 128 (6 Am. Rep. 314); *Cooper v. Stone*, 24 Wend. 434; *Feid v. McLendon*, 44 Ga. 156; *Smith v. Tribune Co.* 4 Biss. 477.

The editors of newspapers have no greater privilege in this respect than other persons, and when they publish that which is false and libelous, they are amenable therefor, whether their motives are good or bad: *Snyder v. Fulton*, 34 Md. 128 (6 Am. Rep. 314).

Belief in libelous matter concerning candidates is no justification: *Aldrich v. Press Printing Co.* 9 Minn. 133 (86 Am. Dec. 84); *King v. Root*, 4 Wend. 113 (21 Am. Dec. 102); *Com. v. Clap*, 4 Mass. 136 (3 Am. Dec. 212).

2. If the matter is false and defamatory, the fact that it had been before published in a newspaper in this county, and that it is copies of articles published and circulated by defendant, is not a defense to this action: *Davis v. Sladden*, 17 Or. 259; *Kenney v. McLaughlin*, 5

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Gray, 3 (66 Am. Dec. 345); *Fowler v. Chichester*, 26 Ohio St. 9; *Stevens v. Hartwell*, 11 Met. 542; *Inman v. Foster*, 8 Wend. 602; *Sans v. Joeris*, 14 Wis. 633; *State v. Butman*, 15 La. Ann. 166; *Evans v. Smith*, 5 T. B. Mon. 364 (17 Am. Dec. 74); *Fitzgerald v. Stewart*, 53 Pa. 343; *Wolcott v. Hall*, 6 Mass. 513; *Alderman v. French*, 1 Pick. 1; *Bodwell v. Swan*, 3 Pick. 376; *Matson v. Buck*, 5 Cow. 499; *Root v. King*, 7 Cow. 613; *Cole v. Perry*, 8 Cow. 214; *Mapes v. Weeks*, 4 Wend. 659; *Shehan v. Collins*, 20 Ill. 325; *Dame Kenney*, 25 N. H. 318; *Smith v. Buckecker*, 4 Rawle, 295; *Freeman v. Price*, 2 Bail. L. 115; Townshend, Slander and Libel, §§ 114, 210, also note 3; *McDonald v. Woodruff*, 2 Dill. 244; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Curtis v. Mussey*, 6 Gray, 261; *Cade v. Redditt*, 15 La. Ann. 492; *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Clarkson v. McCarty*, 5 Blackf. 574.

3. Evidence that after the election defendant repeated the charge of perjury and larceny verbally against plaintiff was admissible for the purpose of proving the malice of defendant toward plaintiff: *Field, Damages*, 694; *Hosley v. Brooks*, 20 Ill. 115 (71 Am. Dec. 252); *Peltier v. Mict*, 50 Ill. 517; *Lewis v. Chapman*, 19 Barb. 252; *Humphries v. Parker*, 52 Me. 502; *Harbison v. Shook*, 41 Ill. 142 (13 Am. and Eng. Enc. Law, 490, par. 8, and authorities there cited; *Com. v. Damon*, 136 Mass. 448.

4. Slanderous matter set up in answer, if not sustained, may be considered in aggravation of damages: *Shartle v. Hutchinson*, 3 Or. 337; *Gilman v. Lowell*, 8 Wend. 573 (24 Am. Dec. 96); *King v. Root*, 4 Wend. 113 (21 Am. Dec. 102).

The attempt to justify if unsuccessful will aggravate damages. Strict proof must be given that the whole charge made is true in every particular: *Collier v. Simpson*, 5 Car. & P. 73; *Klewin v. Bauman*, 53 Wis. 245; *Fero v. Ruscoe*, 4 N. Y. 162; *Bennett v. Matthews*, 64 Barb. 411; *Henderson v. Fox*, 83 Ga. 233; *Smith v. Wyman*, 15 Me. 13;

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Distin v. Rose, 69 N. Y. 122; *Pink v. Catanich*, 51 Cal. 490; *Wilson v. Robinson*, 14 L. J. Q. B. 196 (9 Jur. 726); *Lea v. Robertson*, (Ala.), 1 Stew. 138; *Richardson v. Robertson*, 23 Ga. 215; *Pool v. Devers*, 30 Ala. 672; *Gorman v. Sutton*, 32 Pa. 247; *Updegrove v. Zimmerman*, 13 Pa. 619; *Doss v. Jones*, (Miss.), 5 How. 158; *Freeman v. Fursley*, 50 Ill. 497; *Robinson v. Drummond*, 24 Ala. 174; *Spencer v. McMasters*, 16 Ill. 405.

MR. JUSTICE BEAN delivered the opinion of the court:

1. Before considering the other assignments of error, we wish to advert to the question raised by the motion for a nonsuit, and by certain instructions given and refused by the trial court, and that is whether the publication complained of was *prima facie* privileged by the occasion, and whether this action can be maintained by plaintiff without proof of express malice. The general rule is that in the case of a libelous publication the law implies malice, and infers some damages, if the publication is false, but to this rule there are certain exceptions in what are known as "privileged communications." Such communications are usually divided into several classes, with only one of which we are concerned at this time, and that is, generally stated, thus: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter, which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & Bl. 344, and has been generally approved by judges and text writers. Within this rule it is held that it is not only the privilege, but the duty, of the public press to discuss before the electors the fitness and qualification of candidates for pub-

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lid office conferred by the election of the people; and when a man becomes such a candidate, he must be considered as putting his character in issue so far as respects his fitness and qualification for the office, and that every person who engages in the discussion, whether in private conversation, in public speech, or in the newspapers, may, while keeping within proper limits and acting in good faith, be regarded and protected as one engaged in the discharge of a duty. But it is not believed that this rule can be legitimately carried to the extent of justifying a publication which imputes to a candidate for office the commission of a crime, merely because he is seeking office. "The authorities fully sustain the position," says GREEN, Pres., in an able opinion on the subject, "that a publication in a newspaper, made either of a public officer or a candidate seeking an elective office from the votes of the people, which imputes to him a crime or moral delinquency, is not a privileged communication, either absolute or conditional; but such publication is *per se* actionable, the law imputing malice to the author or publisher": *Sweeney v. Baker*, 13 W. Va. 158 (31 Am. Rep. 757). And in *Seely v. Blair*, Wright (Ohio), 686, it was said by WRIGHT, J.: "As to the point urged, that the plaintiff was a candidate for office, and the defendant an elector, I need only say the relation of the parties to each other, or to the public, confers upon the defendant no right to utter falsehood and calumny. An elector may freely canvass the character and pretensions of officers and candidates, but he has no right to calumniate one who is a candidate for office with impunity. If the law sanctioned such a course, it would drive good men from the administration of public affairs, and throw our government into the hands of the worthless and profligate."

So also in *Bronson v. Bruce*, 59 Mich. 474 (60 Am. Rep. 307, 26 N. W. 671), Mr. Justice CHAMPLIN says: "The electors of a congressional district are interested in know-

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ing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in congress; and it is the right and privilege of any elector or person also having an interest to be represented, to freely criticise the acts and conduct of such candidate, and show, if he can, why such person is unfit to be entrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. 'Slander,' says Judge OVERTON, 'is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people, when, in the exercise of one right, you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character, be freely discussed, but no falsehoods be propagated.' To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled, and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office, and have his reputation tarnished, his good name scandalized in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated, one upon the candidate, the other in misleading the voter. Under such a rule, the advocates of both or all candidates, would let fly their poisoned shafts of defamation, and charges, to be met with countercharges, until the bewil-

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dered voters, not knowing who or what to believe, must of necessity shut their eyes to the fitness and character of the candidates, and join the ranks of the party whose banner bears the inscription, 'Principles, not Men.'"

The rule we gather from the authorities is that the fitness and qualification of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable *per se*, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can be justified only by proof of their truth: *Commonwealth v. Clapp*, 4 Mass. 163 (3 Am. Dec. 212); *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.* 9 Minn. 133 (86 Am. Dec. 84); *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113 (21 Am. Dec. 102); *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardwell*, 136 Mass. 164; *Barr v. Moore*, 87 Pa. St. 385 (30 Am. Rep. 367); *Seeley v. Blair*, Wright (Ohio), 358.

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If it can be said that the cases of *Bays v. Hunt*, 60 Iowa, 251 (14 N. W. 785), *Mott v. Dawson*, 46 Iowa, 533, and *State v. Balch*, 31 Kan. 465 (2 Pac. 609), when read in the light of the facts, announce a contrary doctrine, they do not seem to us to be supported either by reason or the weight of authority. To permit a defendant who has published of a candidate false and defamatory statements concerning his private acts and character, on being pursued in the courts for this grievous wrong, to say in justification that he was actuated by no ill will or malice toward the plaintiff, but his motives were pure and his conduct actuated only by a desire for the public good, would abandon candidates to all the fierce tempests of defamation which either personal spite or political interest may suggest. The only safe evidence of a man's intentions are his acts, and if he accuses another of a crime, he must conclusively be presumed to have intended to injure him. Let the acts, conduct, and public record of a candidate, so far as it may affect his fitness or qualification for office, be the subject of free and vigorous comment, so long as it is done in good faith; but when his private life is assailed by imputing to him a crime, let his accuser either answer in damages, or prove the truth of the charge.

2. The term "freedom of the press," which is guaranteed under the constitution, has lead some to suppose that the proprietors of newspapers have a right to publish with impunity charges for which others would be held responsible. This is a mistake; the publisher of a newspaper possesses no immunity from liability on account of a libelous publication, not belonging to any other citizen. In either case the publisher is subject to the law of the land, and, when the publication is false and defamatory, he must answer in damages to the injured party: *Barnes v. Campbell*, 59 N. H. 128 (47 Am. Rep. 183); *Mallory v Pioneer-Press Co.* 34 Minn. 521 (26 N. W. 904); *Detroit Daily Post v. McArthur*, 16 Mich. 452; *Scheckell v. Jackson*.

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10 Cush. 25. As was said by COLERIDGE, J., in *Davison v. Duncan*, 7 El. & Bl. 231, 90 Eng. Com. Law, "There is no difference in law whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another, and if any person does so, he must defend himself on some legal ground." Judge DRUMMOND says: "We all desire the entire freedom of the press, but it has never been understood as authorizing the bringing of charges against a man of his having committed a crime unless those charges were true. Now, there is nothing in this plea to indicate that these charges were true, but only that they had reason to believe that there was something in them, and that they were made in good faith and for honest purposes by them as the conductors of a public journal. That will not do. It would be tolerating charges in the public press against individuals simply under color of what was claimed to be a criticism. It may be said here that the motive was an honest one, but I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular individual is a thief or a murderer, or that he has committed any other crime in the catalogue of crimes. The only thing that can justify that is that it is true. Under our law, if it is true, he can make it. All public men, if this were the rule, would be at the mercy of every journalist, and they could launch charges against such a man with entire impunity. I do not feel inclined to adopt any rule which would allow such a license": *Smith v. Tribune Co.* 4 Biss. 477.

3. The publication complained of in the case under consideration imputed to the plaintiff a crime of the most infamous character,—that of being a "perjured villian," and by his false swearing deceiving the court,—and, under the law, was not privileged either actually or conditionally, although the plaintiff was at the time a candidate for an elective office. Nor does the admitted fact that it was but

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a re-publication of what Sutton had previously published amount to a justification, even if done in the utmost good faith, and with an honest belief in its truth, and for the purpose of informing the voters. A newspaper cannot copy, without liability, even in the way of news, a libelous from another paper: *Davis v. Sladden*, 17 Or. 259 (21 Pac. 140). But the fact that it was so copied may, and should be, considered, together with all the other circumstances of the publication, when properly pleaded, in determining the good faith of the defendant, and as tending to show want of actual malice, and thus go in mitigation of damages: *McDonald v. Woodruff*, 2 Dill. 244; *Hinkle v. Davenport*, 38 Iowa, 355; *Hewitt v. Pioneer-Press Co.* 23 Minn. 178 (23 Am. Rep. 680). We are of the opinion, therefore, that no error was committed by the trial court in overruling the motion for a nonsuit, or in instructing the jury that malice was implied from the publication, and that the previous publication by Sutton was no defense.

4. The next assignment of error is in the admission, for the purpose of showing malice in fact, of proof that after the publication complained of, and before the commencement of this action, the defendant, in the presence of divers persons said, that "the men that voted for that old forger Upton were thieves, robbers, and sons-of-bitches." If these words can be considered as making any charge against the plaintiff, it is that of forgery, and, as no such charge is alleged in the complaint, the only question presented by the exception is whether in an action for libel, evidence of a charge of a different nature, and at a different time, from that alleged in the complaint, can be given for the purpose of showing malice, or the animus of the defendant in the publication complained of. Upon this question the authorities are in conflict, but in our opinion the better rule seems to be that where the subsequent words or publication impute the same crime, or

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may fairly be considered as a renewal of the original charge, they may be given in evidence as tending to show express malice, and to enhance the damages (*Leonard v. Pope*, 27 Mich. 145); but that evidence cannot be given of actionable words spoken or published on another occasion, and charging a separate and distinct crime from that charged in the complaint, for the purpose of showing malice, or for any other purpose, for the reason as stated by PARKER, C. J., that "This is a different calumny for which the plaintiff has a right to his action, and though it may tend to prove malice as to the first words, so, also, will it necessarily go to enhance the damages, for no jury can say how much or how little of the damages were given on account of this second charge: *Bodwell v. Swan*, 3 Pick. 376. To the same effect are *Root v. Lowndes*, 6 Hill, 518 (41 Am. Dec. 762); *Howard v. Sexton*, 4 N. Y. 157; *Frazier v. McClosky*, 60 N. Y. 337 (19 Am. Rep. 198); *Distin v. Rose*, 69 N. Y. 122; *Barr v. Hack*, 46 Iowa, 308. This is recognized as the better rule by Mr. Townshend in his work on Libel and Slander, § 392; and in a note to Odgers on Libel and Slander, at page 271, Mr. Bigelow, a writer of recognized learning and ability, after a careful review of the authorities in this country, reaches the conclusion that "By the better authorities evidence of the publication of defamation upon the plaintiff other in substance than that sued for is not admissible on grounds of policy." The distinction between the admissibility as evidence of charges of a nature different from those in suit, and the repetition of the charges made in the complaint, seems to be put upon the ground that a repetition of the libel or slander and the original offense may be practically treated as one wrong, and as to the repetitions used in evidence, all barred by the one judgment (*Leonard v. Pope*, 27 Mich. 145, *Root v. Lowndes*, 6 Hill, 518, and *Frazier v. McCloskey*, 60 N. Y. 337), which obviously could not be true of the publication of a different charge. The repeti-

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tions made use of in evidence in a particular trial are treated as barred by the judgment, because the jury are presumed to have considered them in estimating the damages for the original publication. If, however, charges of a different nature are admitted in evidence for the purpose of showing animus,—and they certainly could not be competent for any other purpose,—the jury may indeed be instructed that they must not give damages therefor, yet, as has been remarked, such instruction will be wasted upon the average, and perhaps upon a highly cultivated, jury: *Root v. Lowndes*, 6 Hill 518. For this reason it is thought best to hold “that such evidence is not admissible for any purpose.” The subsequent defamation given in evidence in this case, if true, was a distinct calumny, for which the plaintiff had a right of action, and, indeed, such action was pending at the time it was given in evidence, and hence we think its admission was error.

5. The next assignment of error is in the instruction to the jury that if the plea of the truth of the charge in justification is not sustained by the evidence, “the jury may consider that as a repetition and re-publication of the original charge, and consider the same in aggravation in assessing the damages, and as evidence of malice on the part of defendant against the plaintiff.” It was formerly the law that if the defendant in a libel suit pleaded the truth in justification, and failed to establish such plea, it was considered as evidence of malice, and in aggravation of the injury, and he was precluded from asking any mitigation of damages even if the plea was made in good faith and with an honest belief that it was true: *Bush v. Prosser*, 11 N. Y. 366. But section 91 of the Code of this state, which provides that the defendant in his answer may allege both the truth of the matter charged, and “any mitigating circumstances to reduce the damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances,” has changed the

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rule, and under this section the damages are not necessarily affected by a failure to make good a plea of justification. It will depend upon the motive with which the plea was interposed, and the good faith of the defendant. If, under the color of justification, the defendant seeks to reiterate and perpetuate his slander, it may be considered by the jury as evidence of malice, and in aggravation of damages; but where the plea is made in good faith, and all that can be said is that he has failed to fully support it by competent proof, we do not see the justice of applying a rule to him not applicable to the other litigants who happen to fail in a *bona fide* defense. The result of the decisions of the state of New York, under a statute like ours, is that the mere inability to establish a justification is no evidence at all of malice, or in aggravation of damages, nor will it preclude the defense from asking that the damages be mitigated where it appears that he was free from malice, and had good reason to believe the libel that he published to be true: *Bush v. Prosser*, 11 N. Y. 366; *Bisby v. Shaw*, 12 N. Y. 67; *Klink v. Colby*, 46 N. Y. (7 Am. Rep. 360); *Distin v. Rose*, 69 N. Y. 122; *Spooner v. Keeler*, 51 N. Y. 524. In *Distin v. Rose*, CHURCH, C. J., says: "The Code has made this change in the law as it previously stood, that, although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages if they tend to show good faith or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction, and the circumstances evince malice in reiterating the slander in the pleadings, it is allowable for the jury to take the circumstances into consideration: *Thorn v. Knapp*, 42 N. Y. 474 and cases cited (1 Am. Rep. 561)."

Indeed, the rule of the common law has been deemed so harsh and unjust that it has been modified in this country so that an approved plea of the truth is probably at the present day nowhere held to be necessarily evidence

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of malice, but the question now turns upon the circumstances of the plea: Odgers on Slander and Libel, § 274, note, where the authorities are collated; *Sloan v. Petrie*, 15 Ill. 425; *Harbison v. Shook*, 41 Ill. 141; *Hawver v. Hawver*, 78 Ill. 412; *Pallet v. Sargent*, 36 N. H. 496; *Proctor v. Houghtaling*, 37 Mich. 40; *Ransone v. Christian*, 49 Ga. 491; *Henderson v. Fox*, 83 Ga. 233 (9 S. E. 839); *Ward v. Dick*, 47 Conn. 300 (36 Am. Rep. 57). Now in this case the defendant gave evidence tending to support the plea of justification. Indeed, it was substantially admitted on the trial that the plaintiff did make an affidavit in proof of the publication of the summons in the divorce case of *Moore v. Moore*, which was untrue, his explanation being that it was made by mistake. Upon the other plea, that he committed perjury in the case of the *State v. Madden*, no evidence as to its truth was offered by the defendant, but he gave evidence tending to show that it was made in good faith, and with an honest belief at the time that it was true and could be sustained by the proof. It was therefore error to instruct the jury unqualifiedly that if the defendant failed to sustain the plea of justification they might consider it in aggravation of damages. It should have been left to the jury to decide from the evidence and the manner and spirit with which the defense was conducted, whether the real object of the plea was to defend the action with a reasonable expectation of success, or to repeat the original slander. It follows that the judgment of the court below must be reversed and a new trial ordered. REVERSED.

Per Curiam.

[Argued June 19, 1893; decided July 6, 1893.]

NESTUCCA WAGON ROAD CO. v. LANDINGHAM.

[S. C. 33 Pac. Rep. 983.]

APPEAL—FAILURE TO FILE TRANSCRIPT—SECOND APPEAL.—When a party has perfected an appeal, but failed to file the transcript within the time limited by law, the right of appeal is lost unless the supreme or circuit court shall make an order extending the time for filing the transcript; and a second appeal cannot be taken.

Tillamook County: GEO. H. BURNETT, Judge.

Motion to dismiss an appeal. Granted.

Geo. G. Bingham, for the motion.

William W. Thayer, contra.

PER CURIAM.—The record discloses that on the tenth of September, 1892, plaintiff served a notice of appeal on the defendant, and on the sixteenth of the same month perfected the appeal by filing an undertaking as provided by law, but neglected to file the transcript in this court until after the second day of the October term, or to obtain an order enlarging the time, for which reason the appeal was, on the twenty-fifth of January, 1893, dismissed. While the first appeal was pending and undisposed of, the plaintiff prepared and served a new notice of appeal, and filed a new undertaking, and, after the dismissal of the first appeal, filed a second transcript in this court, and the respondent now moves to dismiss this second appeal on the ground that by the failure to file the transcript on the first appeal within the time allowed by law, the right to an appeal was abandoned, and a second appeal could not be taken. This seems to be the effect of the statute, as construed in *McCarty v. Wintler*, 17 Or. 391 (21 Pac. 195), in which the court said: "Nor has the appellant the right to take a second appeal from the judgment of a circuit

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court where one has already been taken and perfected, though the rule is different where an attempt is made to take an appeal, but in consequence of some irregularity the appeal is not perfected." When, therefore, an appeal has been perfected, the appellant is required by the law to file his transcript by the second day of the next ensuing term of this court or the appeal will be deemed abandoned, the effect thereof terminated, and his right to the appeal lost, unless he secures an order either of this court or of the court below enlarging the time for filing the transcript, and this can only be done upon notice and within the time allowed by law for such filing: *Kelly v. Pike*, 17 Or. 330 (20 Pac. 685).

It follows, therefore, that the motion to dismiss the appeal must be allowed, and it is so ordered. **DISMISSED.**

[Argued July 18, 1893; decided July 31, 1893.]

B. F. DOWELL ET AL. v. DANIEL W. APPLGATE ET AL.

[S. C. 33 Pac. Rep. 937.]

Douglas County: M. L. PIPES, Judge.

Plaintiffs appeal. Affirmed.

A. M. Crawford, and *E. B. Preble*, for Appellants.

J. W. Hamilton, for Respondents.

PER CURIAM.—This is a suit to quiet title to certain real estate in Douglas County, formerly belonging to Jesse Applegate. Passing without notice all preliminary and incidental questions, and coming directly to the merits, it appears—1. That the title to the forty-six acre tract of land under which plaintiffs now claim was in controversy between the same parties in the case of *Dowell v. Apple-*

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gate,* reported in 15 Or. 513 (16 Pac. 651), 17 Or. 299 (20 Pac. 429), and was there adjudged to belong to the defendants, and the question is therefore *res adjudicata* in this case. 2. Plaintiffs' title to the remainder of the land depends upon the validity of a decree of the United States circuit court for the district of Oregon, rendered in the suit of *B. F. Dowell v. Jesse Applegate et al.*, brought to set aside certain conveyances for fraud. From the record of that case in evidence, it affirmatively appears to have been a controversy wholly between citizens of this state and involving no question arising under the laws of the United States, and therefore, in our opinion, the court was without jurisdiction, and the decree is void. It follows that the decree of the court below must be **AFFIRMED**.

[Argued July 11, 1893; decided July 31, 1893.]

FOSHIER v. NARVER.

[8. C. 34 Pac. Rep. 21.]

1. **COLLATERAL ATTACK ON JURISDICTION OF FOREIGN COURT.**—The jurisdiction of a foreign court may always be inquired into, and its judgment collaterally attacked on that ground.
2. **SERVICE OF PROCESS—WRONG NAME—DEFAULT.**—Process served on one by a wrong name is as effectually served as though his right name had been used, and jurisdiction is thereby acquired. A default judgment on such a service is good everywhere.
3. **FOREIGN JUDGMENT—EVIDENCE.**—In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court—the question of liability on the original case is not involved.

Yamhill County: GEO. H. BURNETT, Judge.

Action by W. E. Foshier against John Narver on a foreign judgment. Plaintiff had a judgment, and defendant appeals. **AFFIRMED**.

*NOTE.—This case was appealed to the supreme court of the United States, and the decision is reported in 14 Sup. Ct. Rep. 611.—**REPORTER**.

Opinion of the court— LORD, C. J.

Ramsey & Fenton, for Appellant.

J. E. Magers (*Jas. McCain* on the brief), for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is an action upon a judgment of the district court obtained in the state of Iowa. The plaintiff alleges, in substance, that on the second day of September, 1891, in an action wherein William E. Foshier, the plaintiff herein, was plaintiff, and the defendant John Narver, was defendant, a judgment was rendered by said court in favor of this plaintiff and against the defendant for six hundred and seventy-five dollars damages, and for six dollars costs and disbursements, etc. The answer denies the material allegations of the complaint, and avers that during all the time for more than ten years last past, the defendant was, and now is, a resident of the state of Oregon; that he was not at any time or place or in any manner served with notice, summons, or process in said action prior to the rendering of such judgment. The reply denies the new matter contained in the answer. Upon issue being thus joined a trial was had resulting in a verdict for plaintiff, and a judgment being rendered thereon, the defendant appeals. The errors assigned are the giving of certain instructions by the court, and the refusal to give certain instructions requested by the defendant.

1. The judgment rendered in the Iowa court is founded on a note made and signed by W. F. Narver and P. J. Narver at Ottumwa, Iowa, on the twentieth of November, 1874, due two years after date, and payable to J. W. Kitch. The contention for the defendant is, (1) that the service of process upon him in that case was on the wrong party, and (2) that the jury had the right to consider the fact that the note sued on was signed by P. J. Narver, and not by him, in corroboration of his testi-

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mon to that effect. The doctrine is now well settled that the constitutional provision that full faith and credit shall be given to the judicial proceedings of other states does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered over the subject matter, or the parties affected by it, nor into the facts necessary to give such jurisdiction: *Thompson v. Whitman*, 18 Wall. 457; *Freeman*, Judg. §§ 562, 563; *Black*, Judg. § 901. A defendant has a right to show by proof that he had not in fact been served with process, and, as a consequence, that the court never acquired jurisdiction over his person: *Knowles v. Logansport Coke Co.* 19 Wall. 58.

2. As the defendant must bring his proof within this rule, it is essential in determining whether his contention is tenable, to understand the facts upon which it is founded. The transcript of the proceedings in the Iowa court shows that the defendant in that action was J. or John Narver, and the same name as the defendant in the present case. The notice or summons was addressed to J. Narver, defendant, and the return upon it is as follows: "This notice came into my hand the seventh of November, 1891, and I hereby certify that I personally served the same on the within named J. Narver, by reading the same to him, and offered to deliver him a copy, but he refused to take it, and waived a copy of the same, in Troy Township, Monroe County, Iowa, on the seventh day of November, 1891. (Signed) Daniel McCarty."—"I, Daniel McCarty, being first duly sworn, depose and say that the above and foregoing return of the within notice is correct; that I served the same as above set forth. (Signed) Daniel McCarty."—"Subscribed and sworn to before me this ninth day of November, 1891. Signed this ninth day of November, 1891. C. B. Foshier, Notary Public (Seal)."

The defendant admits that he was in that county and state at the time and place the return shows that he was personally served, and that a person came to him then and

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there and asked him if his name was Narver, which he answered in the affirmative,—that this person read a notice to him directed to P. J. Narver, in an action in which W. E. Foshier was plaintiff and P. J. Narver was defendant, when he told him his name was not P. J. Narver but John Narver, at which such person wrote, or seemed to write, something upon a paper. Upon this state of facts the defendant contends that if the notice served upon him was directed to P. J. Narver in a case against P. J. Narver, the service was upon the wrong party, and that he had a legal right to disregard it, as the service of such person could give the court no jurisdiction of his person. This contention is based on the idea that the defendant's testimony contradicts the proof of service, because it shows that the name in the notice is not the name of the party served, and hence the service is on the wrong party, which he may disregard. But it by no means follows that the wrong party was served, or that there was no legal service because the summons was addressed in a name differing from the name of the defendant served, as P. J. Narver for John Narver. For all that, the service may be on the right party. The name is a means of identity, but the right party may be served by a wrong name; it is not the name that is sued but the person to whom it is applied. Whether the defendant served was the right or wrong party, depended, not upon his name, but whether he was the party liable. Service upon a party by a wrong name is a good service and gives the court jurisdiction. If the party served by a wrong name fails to appear and make a defense, or submits to a judgment by a wrong name, the judgment will bind him as effectually as though rendered in his right name.

In proceedings of this character the defendant may attack the jurisdiction, and show that he had not in fact been served, and that in consequence the court never acquired jurisdiction of his person. This is the object of

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the defendant's testimony. He sought to defeat the jurisdiction of the court which pronounced the judgment on which he is sued, by proof that he had never been in fact served with process. This was the issue to be tried. The return shows that he was personally served and specifies the time and place, and he admits that he was so served but says that the notice served upon him was addressed to P. J. Narver and not J. Narver. Process served on a man by a wrong name is as really served on him as if it had been served upon him by his right name. In such case it seems to us that the court acquires jurisdiction over his person, and, unless he appears and puts in his defense, the court is authorized to proceed to judgment. Assuming, then, that the notice served upon the defendant ran to the name of P. J. Narver, it does not follow, as a legal or logical consequence, that a service of such notice on J. Narver was service on the wrong party. On the contrary, after the defendant was so served, if he failed to appear and show that the plaintiff was not entitled to relief against him, because he was the wrong party, and not liable, when he had an opportunity to be heard on that question, the judgment established the fact that he was the right party and the plaintiff's right to relief against him.

Mr. Van Fleet says: "If John Smith is sued, and service be made personally on the wrong John Smith, he must appear and defend himself. He cannot successfully fight the officer who seizes his property on execution, by showing that he is not the real defendant. The reason is a very plain one. He was afforded an opportunity to make that defence before judgment. The cases all agree on this point. But suppose the complaint and summons called for George Jones, and John Smith is served. How does that differ from the case just put. It is a judicial assertion that the true name of the person served is George Jones, and he is afforded an opportunity to appear and show that

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his name is not Jones, and that the plaintiff is entitled to no relief against him. All the plaintiff can possibly do is to afford him this opportunity. Perhaps the plaintiff stands ready to show that his true name is George Jones, and that he does wrongfully withhold the relief demanded. A judgment in favor of the plaintiff necessarily establishes his right to the relief given against the person served": Van Fleet, Collat. Attack, § 367. It would seem therefore, that the Iowa court had jurisdiction of the defendant, and his contention is not tenable.

3. We come now to the error assigned upon which the reversal of the judgment is sought. The court below, considering that the testimony of the defendant tended to contradict the proof of service, submitted it to the jury. The record discloses that counsel for the defendant attempted to argue to the jury that they had a right to consider the fact that the note sued on and set out in the Iowa record was signed by P. J. Narver and not the defendant, as corroborative of the defendants' testimony contradicting the proof of service, but the court refused, upon objection, to allow counsel to so argue. The instruction asked and refused, and the instruction given, assigned as error, are intended to save and bring up this point. It will be sufficient to say that the court told the jury that they "could not consider the copy of the note sued on as affecting the question of serving notice." The only issue to be tried was whether the defendant was served with process. How the fact that the note was signed by P. J. Narver contradicted the proof of service it is difficult to comprehend. Such fact did not show that the return was false, or that the defendant was not served with the process. Neither the note nor the names upon it could throw light upon the question of service, though they might on the liability which is not now involved. It follows that the judgment must be **AFFIRMED**.

Per Curiam.

[Argued July 25, 1893; decided July 31, 1893.]

JENNINGS v. JENNINGS.

[S. C. 24 Pac. Rep. 21.]

Clackamas County: FRANK J. TAYLOR, Judge.

Suit in equity by Edward T. Jennings against Addie C. Jennings and J. C. Ainsworth, to establish an interest in land. Decree for defendants, and plaintiff appeals. Affirmed.

Victor K. Strobe, for Appellants.

D. C. & C. D. Latourette, and *Bonham & Holmes*, for Respondents.

PER CURIAM.—This is a suit to establish plaintiff's right, as heir of Berryman Jennings, deceased, in certain real estate held by the defendant Addie C. Jennings. The facts are that on the seventh day of December, 1870, Berryman Jennings, the father of the plaintiff and the said Addie, being the owner of the land in controversy, conveyed it by warranty deed to J. C. Ainsworth as security for the sum of six hundred and twenty-five dollars. Ainsworth held the title until 1880, when he concluded to forgive the debt and reconvey the property to Jennings, or such person as he might designate, and for that purpose executed a quit-claim deed, leaving the name of the grantee blank, and forwarded it to Jennings, with a letter authorizing him to fill in the name of any person he might desire as grantee. The complaint avers that the defendant Addie C. Jennings, secretly took possession of the deed soon after its execution, and, without the knowledge and consent of her father, fraudulently and with intent to defraud her father and brothers and sisters, filled in her own name as grantee, and caused the deed to be recorded. But there is an entire failure of proof to sustain this alle-

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gation, and the facts are, as shown by the evidence, that Mr. Jennings, in consideration of love and affection, desired to give the land to his daughter for the reason that she had contributed liberally of her earnings to the support of himself and family, and without her knowledge or solicitation, wrote her name in the deed himself as grantee and delivered it to her, and this was sufficient to convey the title as against him and his heirs, and, in our opinion, requires an affirmance of the judgment. **AFFIRMED.**

[Argued July 10, 1893; decided July 31, 1893.]

WESTENFELDER v. GREEN.

[8. C. 84 Pac. Rep. 23.]

ADVERSE POSSESSION—ADMISSIONS OF GUARDIAN.—Declarations of a guardian in possession of his ward's land are inadmissible to affect the latter's title, or to defeat adverse possession on their part.

Multnomah County: E. D. SHATTUCK, Judge.

Action of Frederick and Ludwig Westenfelder against Flora E. Green to recover possession of certain lots in the city of Portland, resulting in a judgment for defendant, from which plaintiffs appeal. Affirmed.

Zera Snow, and Wallace McCamant, for Appellants.

William W. Thayer, and Emmet B. Williams, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

The facts in this case are that in the year 1867, one Jacob Westenfelder died intestate, seized of the property in question, leaving two minor children by a woman whom he represented to be his wife, and with whom he lived and cohabited as such in Oregon, but who died prior

to his death; that shortly after his death one J. E. Sedlack was duly appointed guardian of the two Oregon children, and in that capacity took possession of the land in controversy, rented and collected the rents thereof, paid the taxes and expenses of repairs, making due account of the same, and continued so to act until about the fourteenth day of June, 1880, when, one of the children having died in the meantime under age and without lineal descendants, the survivor sold and conveyed the property to the grantor of the defendant, who immediately entered into possession, and he and the defendant have continued in the exclusive adverse possession ever since. The plaintiffs claimed and attempted to show that Jacob Westenfelder, who died seized of the property in question, was their father and had lived in Leopoldshafen, in Germany, before coming to America; and while there was married to a woman by the name of Christina Stern, by whom he had four children, of whom only the plaintiffs survive; that his wife in Germany was living at the time he was married to, or commenced living with, the mother of the two children under whom defendant claims. The issues in the case were therefore two-fold: (1) whether the plaintiffs were the heirs at law of the Jacob Westenfelder who died seized of the property in question; and (2) whether the defendant, and those under whom she claims, had been in the adverse possession of the property for a length of time sufficient to bar the plaintiffs' claim, if they were such heirs. The question of adverse possession was not, of course, important, unless plaintiffs could show they were the heirs of the Jacob Westenfelder who died seized of the property; nor was the question of their heirship important if the defendant and those under whom she claimed had acquired title by adverse possession. The jury returned a general verdict in favor of the defendant, but from their special findings it appears they were unable to agree as to whether the Jacob Westenfelder, whom it was claimed

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emigrated from Germany in 1852, was the same person who died seized of the property in question. It would thus seem that the verdict of the jury must have been based on the adverse possession of the defendant and her predecessors in interest, because they were unable to agree upon the other issue in the case, and therefore if no error appears in the record upon the question of adverse possession the judgment must be affirmed; for if the defendant has acquired title by that means, all other questions in the case become immaterial.

The possession of Sedlack, the guardian of the two Oregon children, and of defendant and her predecessor in interest, is conceded to have been exclusive and continuous from the death of Westenfelder to the commencement of this suit; but the contention for plaintiffs is that the possession of the minor children and their guardian was not adverse as to them. As tending to show the character of Sedlack's holding, the plaintiffs offered to prove that while he was guardian of the Oregon children, and in possession, he stated that he was holding the property for the children of Jacob Westenfelder in Germany, but the court refused to admit the evidence, and this ruling is assigned as error. The general rule is well settled that the declarations of one in possession of real property, characterizing his possession, are admissible in evidence against him, and those claiming under him, where title is asserted by adverse possession: 1 Rice, Evidence, § 423. But this action is not against Sedlack or any one claiming under him. He was not in possession of the property claiming any right in himself, but in a representative capacity and under his appointment as guardian, and therefore his possession was in legal contemplation the possession of his wards. A tenant in possession cannot by his admissions injure the title of his landlord (*Hurley v. Lockett*, 72 Tex. 261, 12 S. W. Rep. 212), nor can a guardian the title of his wards. Having accepted the trust and en-

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tered into possession of the property to carry out its provisions, he could not dispute the title of his wards or assert that he is holding the property in any other capacity so long as that relationship existed, nor could he change the character of his holding by any admissions or declarations he might make. Under the facts the law determined for whom he was holding the property, and any statement he might have made to the contrary could not alter these facts nor justify any different determination. The law fixed his relation to the property, and no declaration of his could affect the possession taken and held by him under his appointment. In legal effect, as against his wards, such declarations would amount to nothing. To suffer a guardian by his admission or declaration to defeat or affect the title of his wards would, it seems to us, open the door for the grossest fraud and injustice.

It is also contended that the entry and possession of the Oregon children as heirs of Westenfelder was not hostile to the true heirs. We take the law to be settled that the entry into possession of lands by one heir or tenant in common is the entry and possession of all. The one who enters is considered as doing so for himself, as regards his own right, and as trustee for the others: *Hart v. Gregg*, 10 Watts, 185; *Watson v. Gregg*, *idem*, 289; Busw. Lim. § 235. This is on the theory that there is a privity of estate between the other owners and the one in possession, but in this case there is no privity of estate between the plaintiffs and the Oregon children, but on the contrary their interests are antagonistic and adverse. If the plaintiff's theory is true, the Oregon children were not heirs at all, but strangers to the title, and entered into the possession as mere trespassers, in a mistaken belief of their heirship, and hence there is no room in this case for the application of the rule invoked by plaintiffs. If the Oregon children were in fact heirs, then their entry was in their own right; if, on the other hand, they were not

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heirs, then their entry was the same as that of any other stranger who might enter under a claim of title. Sedlack was not appointed guardian for all the heirs of Jacob Westenfelder, but of the Oregon children by name, and his entry was their entry, and his possession was their possession, made and held under a claim of right, and adverse to all the world, and although they may have had no title or color of title at the time of their entry, it was made under a claim of right and would ripen into a title by adverse possession. It seems to us, therefore, that the other questions suggested become wholly immaterial, and that the judgment must be AFFIRMED.

[Argued July 24, 1893; decided August 1, 1893.]

WELCH v. CLATSOP COUNTY.

[S. C. 33 Pac. Rep. 934.]

TAXATION—INJUNCTION—TENDER OF TAX.*—Equity will not interfere by injunction to restrain the collection of a tax unless it is unauthorized, or, if authorized, is assessed upon property not subject to taxation, or the persons imposing it were without authority in the premises, or they have proceeded fraudulently; nor will it interfere in any case until plaintiff has tendered the amount of tax that can be shown to be due. Particularly is this true where the complaint discloses the value of the property, and the rate of taxation, so that the legal tax is a mere matter of computation.

Clatsop County: THOMAS A. McBRIDE, Judge.

Suit in equity by Nancy Welch, G. Wingate, The Astoria Investment Company, Samuel Elmore, and G. W. Sanborn, partners as Elmore, Sanborn & Co., Samuel Elmore, J. G. Megler, A. J. Megler, W. E. Warren, M. S. Warren, and R. P. Elmore against Clatsop County and

*NOTE.—For previous Oregon decisions to the same effect, see *Brown v. School Dist. No. 1*, 12 Or. 345; *Or. & Cal. R. R. Co. v. Lane County*, 23 Or. 336, and note; and *Goodnough v. Powell*, 23 Or. 525.—REPORTER.

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H. A. Smith, its sheriff, to restrain the collection of a tax. A demurrer to the complaint having been sustained, the plaintiffs appeal from the decree of dismissal. Affirmed.

G. C. Fulton (*Chas. W. Fulton* on the brief), for Appellants.

W. N. Barrett, district attorney, and *Frank J. Taylor*, for Respondents.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is a suit for an injunction to restrain the sheriff of Clatsop County from executing a tax-warrant, issued out of the county court, directing him to collect certain delinquent state and county taxes for the year 1891. The general ground on which relief is sought is that the proceedings in making the assessment roll and levying the tax thereon were so irregular and illegal as to render such tax void. A demurrer to the complaint for the insufficiency of the facts alleged was interposed and sustained, whereupon, the plaintiffs declining to further plead, a decree was rendered by the court dismissing the suit, from which decree this appeal is brought.

The averments of the complaint show that the assessment roll filed by the assessor was crude and imperfect; that it was filed after the time required by law, without any order extending the time for such filing, and that there were various irregularities in the subsequent proceedings in connection therewith; but the main allegations upon which the plaintiffs rely, as showing the invalidity of the taxes assessed, and their right to the relief sought, are that the assessor did not give the notice required by law of the meeting of the board of equalization; that no meeting of such board was held at any time for the purpose of examining the assessment roll so filed

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and returned; that neither the plaintiffs nor any other taxpayers were allowed the privilege of an examination of such roll, nor were they afforded an opportunity of appearing before such board, or any board, or of being heard in regard thereto; that plaintiffs' property was erroneously and wrongfully assessed at a sum in excess of its actual value, and in excess of the proportionate value of the property of a like character and similarly located; and that, by reason thereof, they are required to pay a larger proportion of the taxes of the county than they otherwise would if the same was correctly valued. The complaint then proceeds to describe the property owned by each of the plaintiffs liable to taxation, and the valuation thereof. To illustrate, it is alleged "that there is assessed against G. Wingate on the said assessment roll made by said county clerk property placed by the county clerk at the valuation of fourteen thousand two hundred and ninety-three dollars, making, as appears thereon, a tax due from plaintiff of the sum of three hundred and sixty-two dollars and nineteen cents; but if said plaintiff had known that such roll had been made, or was in the process of making, and had the right of being heard in regard thereto, and had a board of equalization met and examined the same, the valuation would have been greatly reduced, for that the said valuation placed on the property of the plaintiff G. Wingate was and is far in excess of the true cash value thereof, and is much higher than that on property of like nature similarly situated. That the true cash value of said property does not exceed ten thousand dollars."

It is also alleged that the county court made an order levying nineteen and one half mills on the dollar upon all the taxable property in the county, and although there is an averment that the court was without authority to make such order, it is sufficient to say that there is no doubt the court had jurisdiction and power to make such order.

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Without further detail, under this state of facts, the court below held, in sustaining the demurrer, that the plaintiffs were not entitled to the relief sought, because they had failed to do equity by paying or tendering so much of the taxes assessed as are properly chargeable to this property. The ruling of the court was evidently based on the theory that the plaintiffs have shown by their complaint that they are the owners of certain described real property, conceded to be of a certain specified cash value, and liable to taxation for state and county purposes, and, as it is also shown by their complaint, that the county court has levied a tax of nineteen and one half mills on the dollar upon all the taxable property in the county, the amount of taxes properly chargeable to their property is easily ascertained; that, this being so, the plaintiffs had failed to bring themselves within the rule entitling them to the the relief sought, because they have not paid or tendered the amount of such taxes, which, upon their own showing, is justly chargeable against their property.

Mr. High says: "It may be laid down as a general rule that equity will not interfere by injunction with the collection of a tax which is alleged to be illegal or void, merely because of its illegality, hardship or irregularity, but there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law": 1 High on Injunctions, § 485. And again: "Nor will equity interfere by injunction with the enforcement or collection of taxes because of irregularities, illegalities or errors in the assessment of the tax, or in the proceedings incident to its collection, or in the execution of the power conferred upon taxing officers, but in all such cases the taxpayer seeking relief will be left to pursue his remedy at law. And where it does not appear that the established principle of taxa-

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tion has been violated, or that actual and substantial injustice will result from the operation of the tax, or that it was for an unauthorized purpose, equity will not restrain the execution of a deed of land sold for taxes on the ground that the proceedings were irregular, or even void in some particulars": *Idem*, § 486. In *National Bank v. Kimball*, 103 U. S. 732, Mr. Justice MILLER said: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder": *State Railroad Tax Cases*, 92 U. S. 575; *Huntington v. Palmer, Tax Collector*, 7 Saw. 355 (8 Fed. 449). In stating the rule pertaining to the interference of equity with tax proceedings, CATON, C. J. said: "They are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or, if the tax itself is authorized, it is assessed upon property not subject to the tax": *C. B. & Q. R. R. v. Frary*, 22 Ill. 34. In *Mining Co. v. Auditor-General*, 37 Mich. 391, the court says: "Equity will not interfere to restrain the collection of the public revenue for mere irregularities. Either it should appear that the property

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is exempt from taxation, or that the levy is without legal power, or that the persons imposing it were unauthorized, or that they have proceeded fraudulently." Other authorities might be cited to the same effect, but these are sufficient to illustrate the principle of non-interference in tax proceedings established by courts of equity.

Upon the other hand, it must be admitted, there are authorities of great weight and respectability opposed to the doctrine announced in such cases. They are cited and referred to by Mr. High, who says, "the decisions are neither few in number, nor wanting in respectability, which have inclined to a departure from the doctrine of non-interference in equity with the collection of taxes; and it will be found, as we proceed, that the courts have in many instances extended preventive relief by injunction against the exercise of the taxing power in cases where such relief was unwarranted, either upon principle or upon the clear weight of authority": 1 High on Injunctions, § 484; Cooley on Taxation, 536, *et seq.* In view of the authorities, the considerations which influenced a court of equity to restrain the collection of a tax are confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they have proceeded fraudulently. Nor is this all. The plaintiff must, in addition to illegality, hardship, and irregularity, bring his case within some of the recognized foundations of equity jurisprudence and observe the maxim that "He who seeks equity at the hands of a court must first do equity" by paying or tendering the amount of taxes properly chargeable against his property. The rule is founded upon the principle that public policy requires that the revenues should be promptly collected by the agencies established by law for that purpose, and that equity should not interfere with tax proceedings because they are faulty or

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illegal, when no wrong results to the taxpayer by requiring him to pay what is conceded to be due. In such case a court of equity will not enjoin, as Mr. Justice MILLER said, "the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and, if not paid that the complainants escape taxation altogether."

Applying these principles to the case at bar, we find that the plaintiffs have alleged and specified in their complaint the true cash value of their property liable to taxation, thus showing the excess in its valuation which they would have asked the board to remit, and disclosing on the face of their complaint the amount of taxes chargeable to their property which they concede is liable for. In view of these admissions, and the duty incumbent on the owners of property liable to taxation to contribute their lawful share of the public expenses, we cannot see why plaintiffs should not pay so much of the taxes assessed as are admitted to be due, and can plainly be seen they ought to pay. Is it just or equitable that they should pay nothing because their assessment is too high when they concede an amount for which their property is liable? If the board had sat and an opportunity had been afforded them to appear and secure the remission of the excess, they would have been bound to pay the amounts chargeable against their property as corrected. Why, then, should they not pay so much of the taxes assessed as they concede liability for before they ask the aid of a court of equity to be relieved of the excess? The court thinks that, notwithstanding the irregularities in the proceedings, and the failure of the board of equalization to hold its session at the time prescribed by law, by reason whereof the plaintiffs were deprived of an opportunity to be heard and secure the remission of the excess in the valuation of their property, which constitutes their grievance, they ought, nevertheless, to pay what is conceded to be due before the injunction should be granted.

The decree is therefore **AFFIRMED**.

[Argued July 20, 1893; decided July 24, 1893.]

HOWARD v. HOWARD.

[S. C. 33 Pac. Rep. 682.]

Lane County: J. C. FULLERTON, Judge.

Defendants appeal. Modified.

A. C. Woodcock, and L. Bilyeu, for Appellants.

Rufus Mallory, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

This is a suit by Tilmon A. Howard to establish a resulting trust. The complaint alleges that on the twenty-fifth of October, 1878, the defendants S. N. Howard and Ira Allen, and D. C. Howard, plaintiff's father, now deceased, purchased from one James M. Horn, who was the owner in fee thereof, the premises described in the complaint, and agreed to pay therefore nine thousand dollars; that eighteen hundred dollars was paid down, and the balance was made payable in yearly installments of one thousand dollars each, with interest; that the title to the land so purchased was taken in the name of S. N. Howard, who was to hold it in trust for himself, Ira Allen, and D. C. Howard, in equal proportions; that the purchasers immediately entered into possession, cultivated and improved the premises, sold the product thereof, and applied the money to the deferred payments; that up to the death of D. C. Howard the defendants recognized his title to an undivided one third of said premises; that the money remaining unpaid at the time of the purchase has since been paid either from the proceeds of grain produced by them jointly, or with money borrowed on their joint credit; that four thousand dollars was so borrowed of one S. S. Spencer, which had not been paid at the commence-

Opinion of the court—MOORE, J.

ment of this suit; that D. C. Howard died on the fourteenth of November, 1888, leaving plaintiff his sole heir, who, since the death of his father, demanded of the defendant S. N. Howard the conveyance of an undivided one third interest in said land to him, which has been refused.

The defendant S. N. Howard denies all the material allegations of the complaint; and, for a separate defense, in effect, alleges that in pursuance of an agreement between the defendant Ira Allen, one J. M. Howard, and himself, the said land was purchased, and the title taken in his name in trust for himself, Ira Allen, and J. M. Howard. The defendant Ira Allen filed an answer in which, upon information, he denied the material allegations of the complaint. The plaintiff in his reply denies the allegations of new matter in the answer of the defendant S. N. Howard. The testimony was taken, and, upon a report thereof, the court found for the plaintiff, and decreed that the defendant S. N. Howard, within thirty days from the entry thereof, make, execute, and deliver to plaintiff a good and sufficient deed of an undivided one third of the said real property, and that plaintiff have his costs and disbursements, from which decree the defendant Howard appeals.

The answer of the defendant S. N. Howard admits that he held the legal title to said property in trust, but substitutes J. M. Howard for D. C. Howard, as one of the parties for whom he is trustee. The trust character of the deed having been admitted, the only question, then, is whether said defendant was trustee for D. C. Howard or for J. M. Howard. We have carefully examined the testimony, and while there is an irreconcilable conflict therein, we think, without quoting any portion thereof, that it supports the conclusions reached by the trial court. The complaint further alleges, that at the time the suit was commenced there was a debt of four thousand dollars upon

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said property due one S. S. Spencer. The court in its decree did not provide that one third of this sum should be a charge upon the land to be conveyed to the plaintiff. The decree will therefore be modified so that a conveyance of the undivided one third of the premises described in the complaint shall be made subject to said charge, and, as so modified, the decree will be affirmed with costs to respondent. **MODIFIED.**

[Argued July 12, 1893; decided July 24, 1893.]

RAMP v. MARION COUNTY.

[S. C. 83 Pac. Rep. 681.]

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33	144
34	564

24	461
44	84
44	92

TAXATION—POWER OF BOARD OF EQUALIZATION TO ASSESS PROPERTY—
CODE, § 2779.—Where an owner of property subject to taxation fails to see that it is listed and properly valued by the assessor, section 2779 of Hill's Code authorizes the board of equalization to put it on the assessment roll, and put a valuation thereon; and it is the duty of the property owner to attend the sittings of the board, and make any objections that he may desire to the assessment, and if he does not he cannot be heard to complain afterward. *Or. & Cal. R. R. Co. v. Lane County*, 23 Or. 385, approved and followed.

Marion County: GEO. H. BURNETT, Judge.

This is an action by Mary A. Ramp against Marion County to recover one hundred and forty-five dollars and thirty-three cents alleged to have been unlawfully collected by the county from the plaintiff as taxes for the year 1890, and comes here on an appeal by plaintiff from a judgment in favor of the county on a demurrer to the complaint. Affirmed.

Bonham & Holmes, for Appellant.

Jas. McCain, and *D'Arcy & Bingham*, for Respondent.

MR. JUSTICE BEAN delivered the opinion of the court:

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The material allegations in the complaint are that at the time the county assessor called upon the plaintiff for the purpose of listing her property for assessment and taxation, she owned no property liable to assessment and taxation in the county, except three certain mortgages of the aggregate amount and value of two thousand eight hundred dollars. But thereafter, and before the meeting of the board of equalization, she borrowed of Ladd & Bush four thousand dollars, and of Samuel Ramp one thousand dollars, which she loaned to her son B. F. Ramp, taking his promissory note therefor; and that the board of equalization, without any notice whatever, other than the general notice of its meeting, added the sum of six thousand dollars to her assessment, and made no deduction on account of said indebtedness; that she had no knowledge of the action of the board until after its final adjournment, when she applied to the county court for a rebate and correction of her assessment, by a reduction thereof, and an allowance of five thousand dollars for indebtedness, but the court refused to make the correction, and ordered the sheriff to collect the tax, which he did by garnishing the interest due on one of plaintiff's mortgages. The case thus presents the question as to whether the assessment and the tax thereon sought to be recovered back in this action were illegal and void, for if there was simply an overvaluation of the property, or some irregularity in the mode of assessment, or proceedings connected therewith, this action cannot be maintained. To support an action to recover back money upon the ground of the illegality of the tax or assessment, it must appear that the authority to levy the tax, or levy it upon the property in question, was wholly wanting, or that the tax itself was wholly unauthorized, thus rendering the assessment and all proceedings taken for its collection, not merely irregular, but absolutely void: 2 Dillon, *Municipal Corporations* (4th Ed.), § 940; *Winter v. City Council of Montgomery*, 65 Ala.

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403; *Lincoln v. City of Worcester*, 8 Cush. 55. For mere irregularities or overvaluation in the assessment, the statute has provided a board of equalization from which one who is wrongfully assessed or unequally taxed may obtain relief. This is his exclusive remedy, and it is his folly if he fails to avail himself of it: 2 *Desty on Taxation*, § 116; *Davis v. Macey*, 124 Mass. 193.

Now in this case it is not claimed that the county did not have authority by law to levy the tax sought to be recovered back, or to levy it upon the property in question, but the contention for plaintiff is (1) that the board of equalization had no authority to add the six thousand dollars to her assessment, (2) that her property was overvalued, and (3) that she was not allowed a deduction of five thousand dollars for indebtedness. Under section 2779 of Hill's Code, the board of equalization was authorized and empowered to add to the assessment roll the five thousand dollar note belonging to plaintiff, and any other property omitted by the assessor, and to place a valuation thereon without any notice other than the general notice of the meeting of the board: *Or. & Wash. Mtg. Sav. Bank v. Jordan*, 16 Or. 113 (17 Pac. 621); *Or. & Cal. R. R. Co. v. Lane Co.* 23 Or. 385 (31 Pac. 964). If her property was overvalued, either by the assessor or board of equalization, or if she was not allowed the proper deduction for indebtedness, it was but a mere irregularity which did not render the assessment void, and her remedy was by an application to the board of equalization, and, failing to obtain satisfactory relief there, she could have brought the matter before the courts upon a writ of review, and it was her own negligence if she did not do so. We are not aware that any decided case has held that assumpsit against a county will lie to recover money back paid for taxes on the ground of any irregularity, error, or mistake in fact, or in law, in the mode of making the assessment. On the contrary the law is well settled that in such cases the tax-

Points decided.

payer's only remedy is by an application to the tribunal provided by law for that purpose. The plaintiff was chargeable with knowledge that the note and any other property owned by her in Marion County was liable to assessment and taxation in the county, and that if she did not see that it was listed by the assessor, and properly valued, the law authorized and empowered the board of equalization to add it to the assessment roll, and place a valuation thereon, and it was her duty, if she desired to be heard, either on the question of its valuation, or her right to a deduction for indebtedness, to have appeared before the board at the time and place specified in the notice of its meeting, and submitted the matter to it for consideration. This she did not do, but, as we must assume, took her chances on the assessor or board of equalization discovering her property, and, having done so, she cannot now, because the result is unfavorable, have the relief here she might have obtained had she appeared before the board and given a true statement of her property and its condition. The judgment is therefore **AFFIRMED**.

Argued June 19, 1893; decided July 10, 1893.]

SMITH v. KELLY, SHERIFF.

[S. C. 33 Pac. Rep. 642.]

1. **TAXATION—BOARD OF EQUALIZATION—MORTGAGES—CLASSIFICATION OF REAL PROPERTY—CODE, §§ 2770, 2771, 2773—LAWS, 1891, p. 182, §§ 7, 8.**—Under the provisions of sections 7 and 8 of Session Laws, 1891, p. 182, providing that the state board of equalization shall consider real estate and personal property separately in equalizing the value of property in the different counties, and that they shall add to or subtract from the aggregate valuation of the real and several classes of personal property, such per centum in each case as will bring the same to its fair money value; and under the further provisions of sections 2770, 2771, and 2773, dividing real estate into three classes, consisting of (1) city, village, or town property; (2) mortgages, deeds of trust, contracts, or obligations whereby land is made security for the payment of a debt; and (3) all

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25 505
33 642
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other real property,—the power of the State Board of Equalization is not limited to changing the aggregate valuation of all the three classes of real property, but it may increase or diminish the aggregate valuation of any of the separate classes of real property, as, for example, the aggregate valuation of mortgages, without changing any of the other classes. *Or. & Cal. R. R. Co. v. Croisan*, 22 Or. 893, cited and approved.

2. **TAXATION—INCREASE BY STATE BOARD OF EQUALIZATION OF ASSESSED VALUATION—CONSTITUTION, ART. IX., § 1.**—If all of one district class of property is equally assessed in proportion to its value, the fact that another class may be assessed at a different rate in proportion to its value, is not a violation of the constitutional provision that assessment and taxation must be uniform. Const. Art. IX., § 1.
3. **EVIDENCE.**—The claim that the State Board of Equalization wilfully and arbitrarily assessed mortgages in Multnomah County at a higher per cent than other real property in said county for the year 1892 is not sustained by the evidence.
4. **STATUTORY CONSTRUCTION—REPEAL WITHOUT SAVING CLAUSE.**—A statute repealing or modifying the remedy of a party by suit or action, should not be construed to affect proceedings brought before the repealing statute was enacted. *Newsome v. Greenwood*, 4 Or. 119, cited and approved. By analogy the assessment of property and levying of a tax thereon having been completed before the statute authorizing such action was repealed, the collection of the tax so levied will not be thereby affected, even though the repealing act contained no saving clause, since everything will relate back to the date of the levy.
5. **IDEM—LEGISLATIVE INTENT.**—It is a general rule that the repeal of a special tax law destroys the remedy for enforcing the collection of the tax, unless the remedy be reserved; but when a tax system is revised, and the former law repealed, the legislative intent is presumed to be of prospective force only, and prior valid assessments will not be affected.
6. **IDEM—CONTEMPORANEOUS STATUTES.**—Contemporaneous statutes and those *in pari materia* should be construed together, for the purpose of arriving at the legislative intent. Within this rule the repeal of certain sections of a tax law, without any saving clause as to the taxes then due and assessed, does not prevent their collection, where it is followed eleven days later by another law providing that such taxes shall be collected in the same manner as had been previously employed.

Multnomah County: LOYAL B. STEARNS, Judge.

This is a suit by J. E. Smith against Multnomah County and Penumbra Kelly, its sheriff, to perpetually enjoin the collection of a tax levied upon a mortgage of real property taken by plaintiff as security for the payment of nine thousand dollars. The complaint alleges

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that all real and personal property in said county was assessed at fifty per cent of its true cash value, and that the assessment roll was examined and approved by the county board of equalization at such valuation, but that the state board arbitrarily increased the assessment upon the real property, including city and town lots, to sixty-five per cent, and upon mortgages to one hundred per cent, of such true cash value; that the county clerk, in making the tax roll of said county, inserted the values so increased, extended the tax thereon, attached a warrant thereto, and placed it in the hands of the sheriff for collection; that plaintiff's mortgage by said increase in the valuation was taxed at one hundred and seventy-five dollars and fifty cents, but should have been no more than one hundred and four dollars and seven cents, which sum he tendered the sheriff in full satisfaction of the tax thereon, but that said officer refused to accept the tender; and that the tax creates a cloud upon the plaintiff's mortgage. To prevent the collection of this alleged overcharge, he prayed the injunction.

The answer denied these material allegations, and, the case being at issue, was tried by the court and a decree rendered dismissing the complaint, from which the plaintiff appeals. He contends, *first*, that the state board of equalization had no authority to classify mortgages for taxation separate from real estate; *second*, that if such power were given, it would be in contravention of section 1, article IX. of the constitution, and that an assessment upon such classification would be void; *third*, that the evidence shows that the state board of equalization assessed his mortgage at a higher percentum than other real estate in said county; and, *fourth*, that there is now no law under which a mortgage upon real estate can be assessed or taxes levied or collected thereon. Affirmed.

Geo. H. Williams, and William D. Fenton, for Appellant.

Geo. E. Chamberlain, attorney-general, and *John H. Hall* (*Wilson T. Hume*, district attorney, on the brief), for Respondents.

MR. JUSTICE MOORE delivered the opinion of the court:

1. Section 7 of the act creating the state board of equalization provides that said board, in equalizing the valuation of property as assessed in the different counties, shall consider real estate, including town and city lots, separately from personal property; and section 8 of said act provides that said board in the performance of its duties shall add to or subtract from the aggregate valuation of the real and several kinds or classes of personal property of every county which they believe to be valued below or above the true and fair value thereof in money, such per centum in each case as will bring the same to its true and fair value in money: Session Laws, 1891, p. 182. From these sections, appellant contends that there is but one class of real property, and that the state board of equalization had no authority to make any change except in the aggregate value thereof.

The general rule for the interpretation of ambiguous statutes is to give them such construction as shall suppress the mischief, and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, and adding force and life to the cure and remedy, according to the true intent of the makers of the act: *Parkinson v. State*, 74 Am. Dec. 522. The manifest object and intent of the legislature in creating the state board of equalization was to secure uniformity of assessment of the different classes of taxable property between the several counties. The tax levy for state purposes being uniform over the whole territory, and based upon the values fixed by the county assessor, as approved by the local board, if that officer could under value property, notwithstanding

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the law requires him to assess it at its full cash value (Code, § 2770), the amount of the state taxes collected thereon would be correspondingly low, and the temptation would present itself to each county assessor to undervalue property so that his county might escape the payment of as much as possible of its state taxes, while a high rate of taxation for county purposes could be computed upon a low assessment and thus meet the demands of the county. Such a method would seem to offer a premium to that county whose assessor made the lowest assessment of property. The legislature created the state board of equalization to suppress the mischief that might possibly arise from such a system of assessment, and provided the remedy by equalization among the several counties.

Another rule of interpretation is that all the sections of a statute shall be considered together so as to harmonize and give effect to each clause if possible. Section 3 of the act prescribes the oath of office required of the members of the board, and each swears that he will equalize all the property, both real and personal, as enumerated upon the equalized county assessment rolls of the several counties of the state. Real estate is divided into three classes: (1) city, village, or town property, which, if divided into lots and blocks, shall be separately described on the assessment roll: Code, §§ 2770, 2771; (2) mortgages, deeds of trust, contracts or obligations whereby land situated in no more than one county is made security for the payment of a debt; and (3) all other real property, which is to be described by legal subdivisions, or in such manner as to make the description certain: *Idem*, §§ 2770, 2773. These three classes are enumerated on the assessment roll by the county assessor, and the members of the state board of equalization swear that they will equalize them among the several counties. If appellant's contention were true,—that the several kinds of real property constituted but one class, and if either kind was assessed in the judgment of

the board at its full cash value, and the others at less than such value,—then any addition to the aggregate valuation would increase the assessment of one kind of real property above its full cash value, and thus clearly become a violation of section 32 of article I. of the constitution, which requires that all taxation shall be equal and uniform. To illustrate: Mortgages might be assessed in a county at their full cash value, and the other kinds of real property at a nominal sum; in such case the state board of equalization would be powerless to remedy the evil, since any increase of the aggregate valuation would raise the assessed value of mortgages above their full cash value.

In *Or. & Cal. R. R. Co. v. Croisan*, 22 Or. 393 (30 Pac. 219), BEAN, J., says: "To say that the act creating the state board of equalization is a piece of hasty and crude legislation, is to say what is obvious; but laws of this kind are remedial in their character, intended to correct an admitted evil by requiring each county to pay its just proportion of the burden of maintaining the state government, to suppress wrong, and to promote the public good, and should be liberally construed, so as to bring under their operation, says Mr. Endlich, 'as well that which is within their meaning as that which is within their letter'; Endlich, Interpretation Statutes, 346. And when the act in question is so construed in connection with the provisions of the assessment law to which it relates, we think it manifest the board has power to revise and equalize the aggregate valuation of the several classes of real property authorized by law and enumerated upon the assessment rolls." Taking the several sections of the act together, and considering the mischief to be avoided, and the remedy proposed, by the act creating the board of equalization, we think the conclusion reached by this court as announced by BEAN, J., is correct.

2. The legislative assembly has, in the creation of the board of equalization, provided by law for a uniform and

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equal rate of assessment and taxation, and prescribed such regulations as should secure a just valuation of all property, both real and personal, for the purposes of taxation, as required by section 1 of article IX. of the constitution. The record shows that all real estate, including mortgages, in Multnomah County, was valued, in the assessor's judgment, at fifty per cent of its full cash value. The value of the land cannot be definitely determined by an assessor nor any other person. He may make a relative valuation, but can only approximate the actual value, and so long as he exercises an honest judgment that is all that can be expected of any officer. Mortgages being for a fixed sum, their value can be definitely ascertained, while the value of land can only be relatively determined. This being so, can it be said that an assessment is unequal because the assessor erred in judgment as to the value of the land? If this were the rule, the collection of a tax could never be enforced. All that the constitution contemplates, or the statute prescribes, is that the different classes of property shall be equally and ratably assessed; and when an officer has exercised an honest discretion in appraising the value, this is all that can be expected of him. The state board of equalization concluded that when thirty per cent had been added to the appraised value of city, village, and town lots in Multnomah County, such property was then appraised at its full cash value, and that it was necessary to add one hundred per cent to the appraised value of mortgages in order to equalize their appraisal with that of the lots; that is, the state board of equalization considered that the assessor had appraised city, village, and town lots at seventy-six and twelve-thirteenths per cent of their true value, and by adding thirty per cent to that valuation they secured the assessment of such property at its full cash value, while it was considered that mortgages were assessed at only fifty per cent of their value, and that it was necessary to add one hundred per

cent to secure the same result and equalize the different classes among the several counties. It would seem that this was a uniform and equal rate of assessment and taxation, as near as could be determined by the exercise of an honest discretion on the part of the state board of equalization.

3. It is claimed that the state board assessed mortgages at a higher per cent than other real property in said county. The evidence shows that the board adopted a resolution to equalize real property at its fair value in money; that the members of the board visited several counties and tried to equalize the valuation of such property according to its true cash value. The evidence does not in our judgment show any wilful intent or arbitrary act on the part of the board to discriminate against the holders of mortgages or that class of property, and that the percentages added to the different classes of real property were, in the judgment of the board, necessary to bring the assessment of each to the full cash value thereof, as required by law.

4. The legislative assembly, on the tenth of February, 1893, repealed sections 2730, 2735, 2736, 2737, 2753, 2754, 2755, 2756, and 2757 of Hill's Code, commonly known as the Mortgage Tax Law, without any saving clause as to the taxes then due upon mortgages: Session Laws, 1893, p. 6. On the twenty-first of that month another act was passed by the legislative assembly, which provided that the taxes for the year 1892 should be collected in the same way and manner as they were collected prior to the meeting of the legislative assembly: Session Laws, 1893, p. 85. Each act had an emergency clause and went into effect on the date given. Appellant contends that the act of tenth of February swept away the taxes on mortgages, and that the subsequent act could not revive them.

There are three cogent reasons why the repeal without a saving clause should not destroy the remedy: *First*,

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sections 2783-2786, Hill's Code, provide that the county court shall, at its term in September in each year, estimate and determine the amount of money to be raised in its county for county purposes, and apportion such amount, together with the amount of state and school tax required by law to be raised in its county, according to the valuation of taxable property in its county for a year, and such determination shall be entered at large in its records. Sections 2789-2791 provide that the governor, secretary of state, and state treasurer shall ascertain the total amount of revenue necessary for state purposes, and the rate of taxation to be levied upon each dollar of assessment subject to taxation, and apportion the said total revenue among the several counties according to the amount of property subject to taxation therein. Construing these sections together, it would appear that the several county courts of the state are required to levy the state, school, and county taxes at their September terms; and while the amount to be determined by the state officers for current expenses cannot be ascertained at that time, when apportioned it relates back to the levy of the county courts made at the September terms. The levy should be made by the several county courts at that time for the county and other known rates, and also for such rate as may be subsequently apportioned by the state officers for current expenses. "When an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it never existed": Potter's Dwarrior on Statutes, 160. In *Newsom v. Greenwood*, 4 Or. 119, it was held that a statute repealing or modifying the remedy of a party by suit or action, should not be construed to affect suits or actions brought before the repeal or modification, and that when the suit or action had been commenced it followed the principle governing in the exceptional cases. This being the rule heretofore adopted, it would appear, as applied to the case at bar, that the

assessment of the property and levy of all taxes thereon "were past and closed" at the September term of the county courts preceding the repeal of the mortgage tax law on the tenth of February, 1893, thus bringing it within the exception to the general rule. The assessment and levy are equivalent to the commencement of a suit or action, and when the warrant is attached to the tax roll it becomes a judgment which relates back to the levy.

5. *Second*, It is a general rule that, unless reserved, the repeal of a special tax law destroys the remedy for enforcing the collection of the tax; but when a tax system is revised, and the former law repealed, the legislative intent is assumed to be of prospective force only, and hence prior valid assessments will not be affected by such repeal: Cooley on Taxation, 18. The sections repealed provide, in substance, that the mortgage note should not be assessed, but that the mortgage given to secure the debt should, for the purpose of assessment and taxation, be deemed real estate, and assessed to the extent of the debt secured; while section 2735 provided that the tax assessed upon mortgages should be a lien upon the debt and security, and that they might be sold to satisfy the tax. The repeal of the remedy cannot destroy the right. The owner of property owes a duty to the public to bear such a portion of the general burden as the value of his property bears to the value of the whole. Section 2803 of Hill's Code provides that in case any person shall refuse or neglect to pay the tax imposed on him, the sheriff shall levy the same by distress and sale of his goods and chattels; and section 2816 provides that if no personal property be found whereon to levy the warrant, it must be levied upon any real property of the person against whom the tax is levied or charged. The mortgage tax law was only a part of the general system, and the remedy for the collection of taxes due under it was furnished by sections 2803 and 2816, independent of section 2735. In *Belvidere*

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v. *Warren R. R. Co.* 34 N. J. L. 193, it was held, in a similar case, that the repeal of the statute without a saving clause did not destroy the remedy if the collection of the tax was regulated by other acts, and that when the assessment was made the force of the act authorizing it was exhausted. This case was approved in *Main v. Savings Bank*, 68 Me. 515. In the case at bar a remedy was found in section 2735 which was repealed, but this remedy could not be pursued if the taxpayer had any personal property out of which the tax could be made. A remedy was also provided by section 2816 in case no personal property was found, identical with that of section 2735. The remedy provided in section 2735 added nothing to the general system, and hence its repeal could take nothing from it.

6. *Third*, The act of the twenty-first of February, read in connection with the repealing act, leaves no room for doubt as to the legislative intent in reference to the collection of the tax already levied on mortgages. The legislature of Texas on the third of June, 1873, passed an act which repealed a tax law, without any saving clause: *Session Laws, Tex. 1873, p. 198*. A supplemental act was passed on the same day which provided that the repealing act did not relinquish the right to any taxes theretofore assessed: *Idem*, 206. In *Clegg v. State*, 42 Tex. 605, it was said, in a suit to enforce the tax levied prior to the repeal, that "A fair construction of the law under which appellants claim this suit is brought, does not deprive the state of the right to demand and collect taxes levied and assessed under former laws, though repealed prior to its institution: *Potter's Dwarries, Statutes*, 155, note 5; *Sedgwick on Statutory and Constitutional Law*, 31, 113. Evidently it was not the intention of the legislature by the passage of the act of the third of June, 1873, regulating taxation, to relinquish the right to recover taxes previously levied but not collected. To obviate all doubt, and guard against controversy, a supplemental act to this effect was

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passed on the same day. These two contemporaneous acts relating to the same subject matter, must be taken and considered as one statute." It is a well-recognized principle of statutory construction that contemporaneous statutes and statutes in *pari materia* shall be construed together as though they constituted one act, for the purpose of arriving at the intent of the legislature; and where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together: Sutherland on Statutory Construction, § 288. Applying this rule to the acts of the tenth and twenty-first of February, they must be construed together, and this will incorporate into the repealing act of the tenth of February, the saving clause of the twenty-first of February, and thus preserve the right to enforce the taxes upon mortgages, and hence the decree of the lower court is AFFIRMED.

[Argued July 11, 1893; decided July 24, 1893.]

24 475
46 310

WEST SHORE MILLS CO. v. EDWARDS.

[S. C. 33 Pac. Rep. 987.]

1. LANDLORD AND TENANT—CONVEYANCE OF LEASED PREMISES—ASSIGNMENT OF RENT.—An owner or lessor of premises who conveys them without reservation of the rent, has no claim to the rent subsequently accruing, unless such rent has been assigned to him by the grantee.
2. LANDLORD AND TENANT—ESTOPPEL.—A tenant is not estopped from asserting that since his entry into possession, the lessor's title has expired by his conveyance of the property to another.

Yamhill County: GEO. H. BURNETT, Judge.

This is a suit to foreclose a landlord's lien for rent. The facts show that on and prior to the first day of October, 1890, the West Shore Mills Company was the owner and in the possession of certain premises in Yamhill County, which, on or about that day, it leased to the de-

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fendant M. M. Edwards for the crop year of 1891. The mills company, about the twenty-eighth of April, 1891, by its warranty deed duly executed and delivered, granted and conveyed the said premises to one T. S. McDaniel in fee simple, without any reservation whatever, and at the same time through J. C. Trullinger, its agent, entered into the following written agreement with said McDaniel:—

PORTLAND, Oregon, April 28, 1891.

In consideration of T. S. McDaniel purchasing my place near Newberg, Oregon, described in a certain deed given by the West Shore Mills Company to said McDaniel, I hereby represent and guarantee unto said McDaniel that the rent shall be one thousand bushels of A 1 clean wheat and five hundred bushels of A 1 clean oats, all delivered at the depot at Newberg, at threshing time in said year. And that in the matter of a hophouse, that said McDaniel is to pay for the material for a hophouse, and the tenant is to build said house at his (the tenant's) expense. And that the tenant is to leave the hops in good shape, and that said tenant is not to retain said place longer than the first of October, 1891, except by permission of said McDaniel.

J. C. TRULLINGER.

Witness: J. A. STRAIGHT.

I accept the place upon the above conditions.

T. S. MCDANIEL.

The plaintiff alleges that defendant agreed to deliver to it one thousand bushels of wheat and five hundred bushels of oats, when harvested, as rent, which was, by agreement of the parties, made a lien upon all the grain raised upon said land; that defendant had raised thereon a crop of wheat and of oats in excess of the said quantities, but refused to deliver any of it to plaintiff. The defendant admitted the lease, but denied the material allegations of the complaint, and alleged that the rent reserved was one third of the crop raised, which he was ready and will-

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ing to deliver; that plaintiff, since the execution of said deed, had no interest in said premises; that the crops were grown after the deed was executed; that it was agreed between plaintiff and McDaniel that the rent was payable to the latter, and that since the execution of said deed, and before the commencement of this suit, defendant had attorned to McDaniel. The reply put in issue the allegations of the answer, and the cause was referred to J. W. Hobbs, Esq., to take the testimony, and upon the report thereof the court rendered a decree dismissing the suit, from which the plaintiff appeals. Affirmed.

J. E. Magers (*Jas. McCain* on the brief), for Appellant.

Ramsey & Fenton, for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

1. Whether the assignor of a reversion can recover rent accruing after the assignment, is the question presented by this appeal. Rent is a compensation for the use of lands demised, and is treated as a profit arising out of lands and tenements corporeal: *Wood, Landlord and Tenant*, § 448. It is reserved to be paid by the lessee, and is enforced by express covenant, or such covenant is implied from its reservation. The covenant to pay rent runs with the land, and passes with the assignment of the reversion to the assignee: *Tiedeman, Real Property*, § 182. The rent, in such cases, accrues to the holder of the reversion, by reason of his privity of estate with the lessor, and not as the assignee of a chose in action: *1 Washburn, Real Property*, § 549. Rent grows out of the estate, and the enjoyment of it; and it is the privity of estate, rather than of contract, which connects the reversion with the rent. The contract only settles the amount of rent, and the terms of its payment: *Peck v. Northrop*, 17 Conn. 217. Unless specially reserved, rent follows the estate in reversion. It is an incident to the reversion,

though not inseparably so. The rent may be granted away, reserving the reversion, and the reversion may be granted away, reserving the rent by special words; but by a general grant of the reversion the rent will pass with it, as an incident thereto, though by grant of the rent generally the reversion will not pass: *Van Wicklen v. Paulson*, 14 Barb. 654. And, as the rent is an incident of the estate, if the lessor assigns the reversion without reservation, he cannot have any claim for rent subsequently accruing, since it is transferred to his assignee by the conveyance: *Grundin v. Carter*, 99 Mass. 15. When the plaintiff conveyed the reversion of the premises without any reservation, the rent thereafter accruing as an incident of the estate was granted to its assignee; and, as the rent in question accrued after the conveyance, it follows that plaintiff had no legal right thereto, or to prosecute this suit therefor, unless assigned to it by McDaniel. It was formerly held that the assignee of the rent without the assignment of the reversion, could not bring an action for it in his own name, but this doctrine has been overruled, and it is now held that when rent is assigned without the reversion, the assignee may sue the lessee for rent accruing after the assignment, because the privity of contract is transferred: *Hunt v. Thompson*, 2 Allen, 341. The agreement entered into between plaintiff and McDaniel does not purport to assign the rent to plaintiff, and, at most, it can only be considered as plaintiff's guaranty that the rents will amount to a given quantity, and shows, in connection with the evidence, that at the time the conveyance was made it was intended that McDaniel should receive the rents from defendant.

2. Appellant contends that defendant is estopped to deny his landlord's title. This, as an abstract proposition of law, is correct; but when plaintiff had conveyed the premises he was no longer the landlord, and it is now well settled that the tenant is not estopped to deny that since

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his own entry into possession the lessor's title has expired, either by its own limitation, by act of the lessor, or by an eviction by a title paramount: *Hilbourn v. Fogg*, 99 Mass. 11; 2 Greenleaf, Evidence, § 305. And even an attornment to one having the legal title and right to the immediate possession, without actual eviction, could be set up by the lessee as a defense to a claim for rent by the original lessor, as that is equivalent to an eviction: *George v. Putney*, 4 Cush. 351; *Smith v. Shepard*, 15 Pick. 147 (25 Am. Dec. 432). It follows that plaintiff, by its deed without reservation, having granted to McDaniel the rents accruing to the leased premises as an incident of the estate, it has no legal right to bring this suit, and the decree dismissing it must be affirmed. AFFIRMED.

[Argued July 6, 1893; decided July 17, 1893.]

NOLAND v. BULL.

[S. C. 83 Pac. Rep. 983.]

24	479
28	482
29	147
d89	287
e29	560
24	479
45	193

1. **APPEAL AND ERROR—ADDITIONAL FINDINGS OF FACT*—PRACTICE.**—Failure of the trial court to make findings of fact on material issues will not be considered on appeal unless the lower court was asked to make such findings and refused. *Hicklin v. McClellan*, 18 Or. 138, cited and approved.
2. **CONTRACT PAYABLE WHEN SOME FUTURE EVENT SHALL OCCUR.**—Where there is a present indebtedness due absolutely, and the happening of some future event is fixed as a convenient time for payment merely, and such future event does not happen, the debt is payable within a reasonable time.

Josephine County: LIONEL R. WEBSTER, Judge.

This is an action by Delia Noland to recover the sum of five hundred dollars from Benjamin Bull upon a written instrument which was executed and delivered to plaintiff

*NOTE.—To the same effect see *Luse v. Isthmus Transit Ry. Co.* 6 Or. 125, and *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389.—REPORTER.

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for a balance of five hundred dollars claimed to be due her on the sale of the Stephens Ranch to the defendant for the agreed price of two thousand dollars. This agreement is as follows:—

This is to certify that I, the undersigned, do agree to pay the sum of five hundred dollars unto Delia Noland when the sale of the property known as the Stephens Ranch shall be accomplished; the said place to be sold for not less than two thousand five hundred dollars.

(Signed)

BENJAMIN BULL.

Stephens Ranch, October 20, 1884.

Witness agreement: WILLIAM N. SAUNDERS.

It is also alleged that the said realty is now worth more than two thousand five hundred dollars, and that defendant has had a reasonable time within which to sell the same, and that he could long since have sold it for that price, but that, in order to avoid the payment of said sum of five hundred dollars, he neglects and refuses to make such sale, or to pay the five hundred dollars or any part thereof, although the plaintiff has often demanded the same of him. The answer denies all the material allegations of the complaint, except the execution of the written instrument upon which the action is based, and sets up affirmatively, in substance, that there was no consideration for such written agreement; that at the time of its execution the defendant was not indebted to the plaintiff in any sum whatever; that the lands referred to in the written agreement had been purchased by him for one thousand five hundred dollars, and that, the plaintiff representing to him that the lands could be sold for two thousand five hundred dollars, he promised the plaintiff that if he could then sell the land so conveyed to him for that amount, he would make the defendant a present of five hundred dollars, and that, as a result of such representations, he executed and delivered the written agreement set out in the

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complaint; and that he had made every reasonable effort to sell the land for such price but had failed to find a buyer. These affirmative allegations were denied, and, by consent of the parties, the case was tried by the court without the intervention of a jury. Thereafter the court filed its findings of fact and conclusions of law, which were in favor of the plaintiff. A decree having been entered accordingly, the defendant appeals. Affirmed.

William M. Colvig (*C. W. Kahler* on the brief), for Appellant.

Paine P. Prim & Son, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. Preliminarily, it is claimed that the trial court failed to make certain findings of fact which the pleadings show were material and necessary. If that is so, the defendant should have applied to the trial court to make such findings, and if it refused, he could have excepted to the ruling, and brought the matter in an appropriate way to the attention of this court. "Should the circuit court fail or neglect," said THAYER, C. J., "to make a material finding upon the evidence before it, and the bill of exceptions showed that the court was specially requested to make the finding, and it had refused to do so, this court would doubtless deem an exception to such refusal well taken": *Hicklin v. McClear*, 18 Or. 138 (22 Pac. 1057). As the findings of fact by the trial court are conclusive upon this court,* the judgment must be affirmed, unless such findings are insufficient to sustain it.

* NOTE.—The appeal in this case was perfected in March, 1893, before the act of 1893 (*Laws*, 1893, p. 26,) went into effect, and was not decided under this last act which provides that the "findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except an [on] appeal to the supreme court the cause shall be tried anew without reference to such findings."—REPORTER.

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The important question of fact to be determined was whether the consideration for the alleged written agreement was based on an existing indebtedness of five hundred dollars for a balance due from the defendant to the plaintiff on the purchase price of the Stephens Ranch, which the plaintiff sold to him. It is alleged in the complaint that the plaintiff sold and conveyed to the defendant certain real property known as the Stephens Ranch for the agreed price of two thousand dollars; that the defendant paid thereon the sum of one thousand five hundred dollars, and that he executed and delivered to the plaintiff the written agreement set out to pay the balance of five hundred dollars. The defendant denied these allegations, thus forming an issue which rendered the defense of a want of consideration unnecessary; for, if the indebtedness actually existed as the basis, or formed the consideration, of the written agreement at the time of its execution and delivery, it would defeat the defense set up that such agreement was without consideration, or a mere promise to make plaintiff a present of five hundred dollars if the defendant should succeed in selling the property for two thousand five hundred dollars. The court found, in substance, that at the time alleged the plaintiff sold and conveyed to the defendant certain real property known as the Stephens Ranch for the agreed price of two thousand dollars; that the defendant paid one thousand five hundred dollars of such purchase price, leaving a balance of five hundred dollars due and unpaid; that at the time alleged, the defendant, being indebted to the plaintiff in the sum of five hundred dollars as a balance due on said purchase price, delivered to her the said written agreement, and that more than seven years elapsed between the execution of the written agreement and the commencement of the action; so that it appears from the facts as found by the court that when the written agreement was executed and delivered to the plaintiff, the defendant was

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actually indebted to her in the sum named, as a balance due and unpaid on the purchase price of the ranch, and that such indebtedness formed the consideration of the agreement. This result fully sustains the allegations of the complaint upon which issue was joined, and renders futile and unavailing the contention of the defendant, unless the conclusion of law which the court deduced from its findings of fact is unwarranted and erroneous. The court found as a conclusion of law that the written instrument was an agreement or promise to pay the plaintiff the sum of five hundred dollars within a reasonable time, and that the seven years which had elapsed prior to the commencement of the present action is a reasonable time. The real question, then, to be determined, is the construction which should be given to the written agreement under the pleadings and findings of fact. Under the facts found, the the agreement did not create the indebtedness, but postponed the time of payment of a debt then due to an uncertain future time. The agreement of the defendant is "to pay the sum of five hundred dollars unto Delia Noland when the sale of the property known as the Stephens Ranch shall be accomplished * * * for not less than two thousand five hundred dollars"; and not that the defendant will pay such amount if he succeeds in selling the ranch for such price. The five hundred dollars was an existing indebtedness at the time the agreement was executed by the defendant and accepted by the plaintiff, the effect of which agreement was to postpone or defer the time of payment of an already due and existing debt to an uncertain date, dependent upon the accomplishment of a specified transaction, namely, the sale of the Stephens Ranch at the price mentioned.

2. Where there is a present debt then due, constituting the basis of an agreement which merely postpones the time of its payment to an uncertain future date, when a certain specified transaction shall be accomplished, the

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agreement is to pay within a reasonable time whether such transaction is accomplished or not. In *Crocker v. Holmes*, 65 Me. 195 (20 Am. Rep. 687), it was held where the maker of a note promises to pay a certain sum when he shall sell the place he lives on, that the debt is absolute, though its payment may be postponed;—that it is the duty of the maker to sell within a reasonable time that he may discharge his indebtedness, and that he cannot avoid liability by putting it out of his power to perform his contract. APPLETON, J., in announcing the opinion of the court, said: "It is claimed that the debt will never become payable, and can never be enforced. The maker of the note promises to pay when he shall sell the place he lives on in Oxford, Maine. The debt is due *in presenti*. Its payment is at a future time, but the debt none the less exists. The debt is absolute, the time of payment indefinite. * * * The maker of the note is to sell within a reasonable time, to enable him to discharge his indebtedness." In *De Wolf v. French*, 51 Me. 420, it was held that where a debt is due absolutely, and the happening of a future event is fixed upon as a convenient time for payment merely, and the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time. In *Nunez v. Dautel*, 19 Wall. 562, the agreement was "to pay as soon as the crop can be sold, or the money raised from any other source," and it was held payable in a reasonable time. Mr. Justice SWAYNE said: "It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold, and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice." In *Ubsdell v. Cunningham*, 22 Mo. 124, the instruments were made payable "as soon as collected from my accounts at P.," etc., and they were held promissory notes, and not mere conditional obligations, and that they were

payable within a reasonable time, or as soon as all was collected that could be. In *Sears v. Wright*, 24 Me. 278, the condition was, "from the avail of logs bought of M. when there is a sale made." Held, payable in a reasonable time. The court said: "By the terms of that contract it could not be inferred that the plaintiff had consented to subject himself to such contingency (that is, that the logs could not be sold). His agreement in terms was to wait till the logs could be sold; and thus the defendants had a duty to perform. They were bound to sell the logs, and to do it within a reasonable time": *Hicks v. Shouse*, 17 B. Monroe, 483; *Williston v. Perkins*, 51 Cal. 554; *Randall v. Johnson*, 59 Miss. 317 (42 Am. Rep. 365).

The defendant promises to pay the five hundred dollars when the sale of the property shall be accomplished for a specified sum. There is a present debt, but its payment is postponed to a future time; yet the debt nevertheless exists. The defendant promises or undertakes to sell the property for the sum specified that he may discharge his indebtedness, and if he fails to do so, or is unable to sell the property, such indebtedness becomes due and payable within a reasonable time. As the findings show that the indebtedness existed and was due, and that its payment was postponed to a future uncertain date by the acceptance of the agreement, which operated not to create the debt, but to extend the time of its payment for a reasonable time, whether such sale should be accomplished or not, it results that the findings are sufficient to support the judgment which must be affirmed. **AFFIRMED.**

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[Argued June 16, 1893; decided July 16, 1893.]

BRUCE v. PHOENIX INSURANCE CO.

[S. C. 34 Pac. Rep. 16.]

1. **PLEADING ESTOPPEL.***—It is now the settled rule in Oregon that an estoppel *in pais* must be pleaded to be available as a defense.
2. **REFEREE'S REPORT—APPEAL.**—The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party, or to sustain the findings as made. *Lovejoy v. Chapman*, 23 Or. 571, cited and followed.
3. **INSURANCE POLICY—BREACH OF CONDITION.**—A provision of a policy of insurance that the building shall be occupied as a residence, and that if it becomes vacant for ten days the policy shall be void, is binding upon the insured, and allowing the building to be vacant for more than the specified time will prevent recovery.
4. **INSURANCE—WAVING PROOFS OF LOSS.**—A policy holder who fails to make proof of loss within the time specified therefor in the policy of insurance, cannot recover upon the policy unless such proofs have been waived by the company.

This is a suit brought by W. S. Bruce against the German Savings and Loan Society and the Phoenix Insurance Company to recover from the latter one thousand eight hundred dollars, the amount claimed to be due on an insurance policy, on account of a loss by fire. The facts show that on the thirty-first of May, 1890, plaintiff was the owner of certain real property in Portland Homestead, Multnomah County, upon which was a two-story frame building of the value of about two thousand six hundred dollars, and on that day he executed and delivered to the German Savings and Loan Society a mortgage upon said real property to secure the sum of one thousand dollars, payable in three years from that date, in which mortgage he covenanted to keep said building insured for one thousand eight hundred dollars against loss

* NOTE.—This question is reviewed at length in a note to the case of *Tyler v. Hall*, 27 Am. St. Rep. 344, where it is concluded that the rule is now firmly established, particularly in the code states, that estoppels must be specially pleaded where an opportunity has been afforded for so doing.—REPORTER.

24	486
c29	302
34	486
30	468
24	486
37	624
24	486
42	260
42	611
24	486
147	370

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by fire in some reputable insurance company, the loss, if any, to be made payable to said mortgagee; that on the second of June, 1890, he made application to one J. A. Arment, a local agent of the Phoenix Insurance Company, for an insurance upon said building in the sum of one thousand eight hundred dollars, for the term of three years, while occupied as a family dwelling, and paid twenty-seven dollars as a premium thereon, and thereupon the company executed and delivered to him policy number 3538, as applied for by him, which he delivered to said German Savings and Loan Society as collateral security for its loan, and to be held by it as trustee for the plaintiff, after the payment of the said mortgage debt; that on the fourth of July, 1891, said building was totally destroyed by fire, and the plaintiff, on or about the seventh of that month, notified the agent of the insurance company thereof, but the company failing to pay said loss, the plaintiff requested the German Savings and Loan Society to bring an action against the said insurance company upon said policy, which it refused to do, thus compelling him to bring a suit in equity to protect his rights.

The conditions of the policy issued to plaintiff, and relied upon by the insurance company to defeat the recovery, are as follows: "This entire policy, unless otherwise provided by agreement endorsed thereon or added hereto, shall be void if * * * a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days." The policy also provides, among other things, that "if fire occur the insured shall give immediate notice of any loss thereby in writing to the general agent at San Francisco, * * * and within sixty days after the fire, unless such time shall be extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest

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of the insured, and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; * * * any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose the building herein described, and the several parts thereof, were occupied at the time of the fire," etc. The policy further provided that "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." Reference is also made in the policy to the application and survey of the insured.

The plaintiff alleged that he had duly performed all the conditions of said policy on his part to be performed. The insurance company, after denying the material allegations of the complaint, set up three separate defenses: *First*, that plaintiff caused to be constructed a frame building with shingle roof at a distance of thirty-five feet from the insured building, when at the time the policy was written the space was one hundred feet to the nearest building, thereby increasing the hazard without notifying the company; *second*, the building insured became vacant and unoccupied, and so remained for more than ten days; and, *third*, the insured furnished no proof of loss as required by the policy, and that such proof was not waived by the insurance company.

After the issues were completed the cause was referred to Mark O'Neil, Esq., to take the testimony and report his findings of fact and conclusions of law thereon; and, after some testimony had been taken, the plaintiff, by leave of the court, filed an amended complaint in which he alleged that he offered to furnish the insurance company with due proof of loss, but that it, by its duly authorized agent, waived the condition of said policy by which it was

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required to furnish proof of loss to said defendant, and relieved and discharged the plaintiff from the performance thereof by stating to him that the said insurance company would not pay said loss. After the testimony had been taken, the referee reported as his findings of fact, that said building was and had been unoccupied for more than ten days prior to the fire, without the knowledge or consent of the insurance company or its agents; and that the insured failed and neglected to make proof of loss within sixty days after said building was destroyed by fire, and that said insurance company had not extended the time in writing to said insured to make such proof of loss—but he made no findings upon the question of the hazard caused by the construction of said frame building at a distance of thirty-five feet from the building covered by the policy in question; and, as a conclusion of law, found that the insurance company should recover from the plaintiff its costs and disbursements. The court approved the report of the referee, and a decree was rendered dismissing the suit, from which the plaintiff appeals.

Geo. A. Brodie (John M. Gearin, Julius Silvestone, and Daniel R. Murphy on the brief), for Appellant.

Rufus Mallory (Cyrus A. Dolph, Chas. B. Bellinger, and Joseph Simon on the brief), for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

The appeal presents the following questions: Was the hazard increased by the construction of another building after the policy was issued? Was the house unoccupied at the time of the fire, and had it been so unoccupied for more than ten days prior thereto? Was the proof of loss waived by the insurance company? We do not deem it necessary to examine the first question, as we think the solution of the other two decisive of the case.

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1. The plaintiff alleges that he duly kept and performed all the conditions of the policy to be performed by him. The answer denies this, and for a separate defense alleges that at the time of the fire the house was unoccupied, and that it had been so unoccupied for more than ten days prior thereto, without the knowledge or consent of the insurance company. The reply denies this separate defense, and the issue is thus clearly made by the pleadings upon this question. The proof conclusively shows that at the time of the fire the house was unoccupied, and that it had not been occupied for about six weeks prior thereto, and that the company had no knowledge thereof. The plaintiff contends, however, that at the time he applied for insurance, J. A. Arment, the agent of the insurance company, visited the house in question and knew that the building was unoccupied, and that, having accepted the risk with knowledge thereof, the company is estopped from disclaiming a waiver of the policy on that account; that such knowledge on the part of the agent is notice to the company, and that the act of issuing the policy constitutes an estoppel *in pais* which can be established by evidence without any allegation in the pleading to support it. It is well settled at common law that an estoppel *in pais* need not be pleaded (Bigelow, Estoppel, 699), but the contrary has been held in this state. In *Rugh v. Ottenheimer*, 6 Or. 231 (25 Am. Rep. 513), it was held in a case in which the legal title to real property of the wife was held by her husband, that she was not estopped to claim the title against the husband's creditors, who had furnished goods upon the faith of his ownership of the land, the defendant having failed to allege the facts constituting the estoppel. BOISE, J., said: "If she had been guilty of fraud which would estop her, then the same should be pleaded to make it allowable, which is not done, and the matter of estoppel cannot be considered in this case." So in *Remillard v. Prescott*, 8 Or. 37, it was held that where the defend-

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ant had, without objection, permitted the plaintiff to make improvements and pay the taxes upon defendant's land the latter was not estopped from claiming the legal title, and that it could not be controverted without alleging the estoppel. The same learned justice said: "The appellants claim title by estoppel, and if they intended to rely on such title, they should have pleaded it in the complaint, as they had and opportunity to do. They made their case on the complaint, wherein they relied on the fact that Craig had purchased the property from Chapman, and that by mistake, or the procurement of Prescott, the deed was made to Prescott and Craig. We think, therefore, that the matter of estoppel, as sustaining the claim of the appellant as prayed for, cannot be considered in this case." These cases have settled the rule in this state that an estoppel *in pais* must be pleaded, and we see no reason for changing it. The plaintiff relied upon the issue he made in his complaint, and not upon the estoppel, and, having elected his cause of suit, he should be bound thereby.

2. The original complaint, in substance, alleges that on the seventh of July, 1891, plaintiff notified the company of his loss, and thereafter furnished said insurance company with due proof thereof, while the amended complaint admits that no proofs were ever made. The evidence fails to show that plaintiff offered, or that the company rejected, any proof of loss as alleged in the amended complaint, or that the company by its agent ever told the plaintiff the loss would not be paid, thereby relieving him from the necessity of making the required proof. The plaintiff testified that about five days after the fire he called upon J. D. Coleman, the agent and adjuster of the insurance company, who told him the loss would be paid; that about five or six days after the first visit, he again called upon Mr. Coleman who then told him the company would not pay. He also testified that

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he saw A. F. Gartner, the general agent of the company, who told him at first that they would see about the loss, and at another time that the company would not pay it. Mr. Coleman testified that the first time he saw the plaintiff after the fire was between the fifteenth and twentieth of July, and that he never at that or any time told him the loss would not be paid. Mr. Gartner testified that plaintiff called upon him and wanted to know when the company was going to pay him, and that he told him the loss was payable to the German Savings and Loan Society, and that if any money was paid on the policy it must be paid to that society. Upon this contradictory evidence the referee found that the company had not waived the condition of the policy which required proof of loss within sixty days from the time of the fire by informing the plaintiff that the loss would not be paid.

It is impossible for the appellate court, in the examination of a record, to determine the preponderance of evidence with that degree of certainty attainable by a court or referee who saw the witnesses, heard them testify and noted their manner and appearance while on the witness stand; and the findings made under such circumstances will rarely be disturbed when there are other facts and circumstances which tend to weaken the testimony of the defeated party, or to corroborate the conclusions reached: *Lovejoy v. Chapman*, 23 Or. 571 (32 Pac. 687). There are several facts and circumstances which tend to impair the testimony of the plaintiff. In order to secure the insurance upon the new building, which it is claimed increased the hazard to the building in question, and which was burned at the same time, he averred in the affidavit made in proof of his loss that at the time of the fire he was occupying the new house, and, upon this proof, secured his insurance. Soon after, he made another affidavit in which he swore that prior to, and at the time of, the fire the house covered by the policy in question was and had

been occupied for about six weeks, while at the trial of this cause he testified that he occupied the house in question and had slept therein nearly every night for six weeks prior to the fire. In this he is contradicted by his neighbors who testified that he neither occupied the house nor slept therein, but that he occupied and slept in the new house upon which he received his insurance from another company. Considering these facts and circumstances, we think the referee and court were fully warranted in the conclusions reached, and that the preponderance of the evidence upon this question is with the defendant company, and that the agents of the company never told the plaintiff that his claim would not be paid as alleged in the complaint.

3. The policy of insurance is the contract between the insurer and the insured upon which the latter must rely for the recovery of his loss. In the case at bar, the application is for an insurance of the building while occupied as a family dwelling, and this application is referred to in the policy as the foundation upon which it must rest, and it thereby becomes a warranty of the insured that the building will be occupied in that manner: 1 Wood, Insurance, § 156. The policy provides that if the building shall be or become vacant for ten days without the consent of the company, the policy shall become void. In *Commercial Insurance Co. v. Mehlman*, 48 Ill. 313, the policy provided, that it should be vitiated by keeping * * * saltpetre, * * * and upon proof that the insured kept a keg of saltpetre for sale it was held that, "whether saltpetre will explode or not, may be a vexed question, and whether dangerous or not is immaterial; the agreement was that the assured should not keep it, and if he did the policy should be vitiated, and he must be held to the agreement." The agreement entered into was that the building should be occupied, and that if it became vacant for ten days the policy should be void, and the insured

Points decided.

must be held to this agreement, which was a part of his warranty.

4. Proof of loss as provided in the terms of the policy is a condition precedent to recovery (2 Wood, Insurance, § 436), and since the plaintiff did not make it within the time prescribed, he waived his claim thereto, and for these reasons the decree is **AFFIRMED**.

[Argued June 9, 1893; decided July 17, 1893; rehearing denied August 2, 1893.]

JOHNSTON v. WADSWORTH.

[S. C. 34 Pac. Rep. 13.]

1. **SPECIFIC PERFORMANCE OF CONTRACT TO PURCHASE LAND—EQUITY.**—Specific performance to enforce a contract for the purchase of land will be granted at the instance of the vendor when he tenders a deed, since the relief asked is not only the payment of money but the acceptance of the deed.
2. **SPECIFIC PERFORMANCE—VENUE—CODE, § 387.**—A suit for the specific performance of a contract to purchase land is one *in personam* and not *in rem*, and may be brought in a county other than that in which the land lies, notwithstanding section 387 of Hill's Code, providing that suits for the specific performance of agreements relating to real estate shall be commenced and tried in the county where the subject of the suit is situated.
3. **SPECIFIC PERFORMANCE—WAIVER OF OBJECTION TO VENUE—CODE, § 388.**—The objection that a suit is not brought in the proper county is too late after trial upon the merits.
4. **CONTRACT TO PURCHASE LAND—MUTUALITY.**—An agreement by a vendor upon a proper consideration to repurchase land if the vendee shall so desire, is not void for want of mutuality, where the option is exercised within the time limited. When the option is exercised the minds of the parties meet and the contract becomes mutual.*
5. **CONSIDERATION—SEAL—STATUTE OF FRAUDS—CODE, § 785.**—A seal is of itself the expression of a consideration sufficient to satisfy the state of

* NOTE.—The case of *House v. Jackson*, *ante*, p. 89, contains a discussion of the question whether an owner of land can be compelled to comply with an agreement to sell it. There is a valuable note on the rights that are conferred by a "refusal" or an "option" on land with the case of *Litz v. Goodling*, 21 L. R. A. 127.—REPORTER.

Statement of the case.

frauds, requiring an agreement or memorandum for the sale of lands to express the consideration.

Multnomah County: LOYAL B. STEARNS, Judge.

This is a suit in equity by S. R. Johnston against Philip C. Wadsworth, for the specific performance of a written contract. The complaint alleges that the plaintiff and defendant entered into an agreement whereby the defendant, in consideration of the sums to be paid as alleged, agreed to procure title for plaintiff to certain school lands belonging to the state, and at the same time, and as a part of said agreement, expressly stipulated that if the plaintiff should be dissatisfied with the land at any period within six months from or after the date of said agreement, and if plaintiff should so desire, the defendant would purchase said lands from him at the rate of three dollars per acre; that in pursuance of such agreement, application was duly made for the purchase of the land described in the complaint, and plaintiff made the purchase relying upon defendant's agreement to repurchase the land; that upon examining such land, the plaintiff ascertained that the same was of little or no value, and thereupon notified the defendant of his desire that he should repurchase the same in accordance with his agreement, which the defendant failed and refused to do; that the plaintiff has made due tender to the defendant of a transfer of said land in compliance with his agreement, etc. A demurrer to the complaint was interposed by the defendant on two grounds: *first*, that the complaint does not state facts sufficient to constitute a cause of suit; and, *second*, that the court did not have jurisdiction of the subject of the suit. The demurrer was overruled, and the defendant answered, denying the allegations of the complaint and alleging that the procurement of the land for the plaintiff constituted the only contract that was made between them and that it had been fully executed. The cause being referred to

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Frederick R. Strong, Esq., the findings were for the plaintiff, which, after argument, were affirmed by the court and a decree was entered specifically enforcing the contract, from which decree the defendant has brought this appeal. Affirmed.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. The objection to the jurisdiction, presented by the demurrer, is based on two grounds: *First*, that the plaintiff has a plain, and adequate remedy at law; and, *second*, that the suit was not brought within the county in which the land is situated. Upon the first point the contention is that the facts show that the only relief sought is a money judgment, and hence that the plaintiff is not entitled to the remedy of a specific performance unless there were acts alleged which the defendant is required to perform other than the single payment of money. "While it is true," as was said by Mr. Pomeroy, "that in these suits by the vendor there is generally some other act to be done by the purchaser besides the simple payment of money, the performance of which may be enforced by the decree, yet," he adds, "even in those cases, when no such act has been undertaken by him in the contract, he may be compelled to accept the deed, or assignment, or other subject matter, as well as to pay the price, so that the decree is not purely one for the recovery of money": Pomeroy on Specific Performance, § 6. In the case at bar the plaintiff alleges, among other things, a tender to the defendant of a deed for the land, and that he brings the same into court and thereby tenders to defendant a transfer of all his rights to such land. Upon this state of facts, the court would be authorized by its decree to compel the defendant to accept the deed, as in fact it has done, as well as to pay the price of the land, so that the decree would not be purely one for the recovery of money. The general rule

that a court of equity will take cognizance of contracts sought to be enforced by the vendor as well as those sought to be enforced by the vendee, is well settled, for Mr. Pomeroy says: "Since the vendee may, by a suit in equity, compel the execution and delivery of the deed, the vendor may also by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money": Pomeroy on Specific Performance, § 6. "As the vendor of land," says Mr. Waterman, "seeks only the payment of the purchase money, it might be contended that he had an adequate remedy at law, and therefore could not sustain a bill for the specific performance of the contract; but," he adds, "a moment's reflection will, however, show that damages would not restore him to the situation he would be in if the contract were performed": Waterman on Specific Performance, § 15. Pecuniary damages for the breach of the contract is not what the plaintiff asks or is entitled to receive at the hands of a court of equity. He asks to receive the price stipulated to be paid in lieu of the land. While it is said that specific performance is not a matter of absolute right in a party, but of sound discretion in the court, yet the rule has come to be established, if a contract respecting real property is in writing and is certain, fair in all its parts, for an adequate consideration, and capable of being performed, it is as much a matter of course for courts of equity to decree specific performance of it as it is for a court of law to give damages for the breach: 2 Beach, Equity Jurisprudence, § 636; Tiedeman, Equity Jurisprudence, § 493.

2. The second objection to the jurisdiction is based on the fact that the lands which the defendant contracted to purchase are situated in Jackson County, and the suit to enforce the contract was brought in Multnomah County. It is claimed that under section 387, Hill's Code, the circuit court of Multnomah County had no jurisdiction to

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enforce the specific performance of a contract in relation to lands located in Jackson County. As a general rule it is not necessary in equity that the subject-matter of a suit should be corporeally within the jurisdiction of the court, provided that the parties are in person within the jurisdiction, so that they can be personally summoned to answer the complaint; hence the rule that where the court has jurisdiction of the proper parties, it may compel them to do equity in relation to lands located without its jurisdiction in another county or state: Tiedeman, Equity Jurisprudence, § 475. "A suit for the specific performance of a contract," said GRAY, C. J., "proceeds *in personam*, and may be maintained in any court of equity which has jurisdiction of the parties, even if the land lies in another state or foreign country": *Brown v. Desmond*, 100 Mass. 269; see also *Gardner v. Ogden*, 22 N. Y. 327; *Sutphen v. Fowler*, 9 Paige, 281; *Massie v. Watts*, 6 Cranch, 148; 3 Pomeroy, Equity Jurisprudence, § 1313. The relief sought by this suit is not to determine title, but to recover the price stipulated to be paid for the land. The decree is *in personam* and not *in rem*, and it would seem, therefore, when the parties are within its jurisdiction, a court of equity may make its decree *in personam* for the specific performance of a contract for the sale of land in another county, notwithstanding section 387.

3. However that may be, if the plaintiff brought his suit in the wrong county the defendant waived this objection under section 388 by not availing himself of the right to a change of venue to the proper county. We think, therefore, that it is too late to raise this objection after a suit has been tried on its merits.

4. The next objection is that the contract is not mutual. This objection is based on the well settled rule that equity will not specifically enforce a contract unless it is mutual in its obligations. But this rule is subject to certain well established exceptions, to which, it is claimed,

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the contract sought to be enforced belongs. The facts show that defendant made an agreement with the plaintiff, in consideration of the payment of a certain sum of money, a part of which was to be retained by the defendant, and a part thereof to be paid to the state of Oregon, whereby he promised to obtain title for the plaintiff to certain school lands belonging to the state of Oregon, and that as a part of said contract, the defendant made and delivered to the plaintiff his agreement, as follows:—

PORTLAND, Oregon, February 19, 1891.

I hereby covenant and agree to purchase from S. R. Johnston six hundred and forty (640) acres of land, three hundred and twenty (320) applied for from the state of Oregon by John Harriman and transferred to him, and three hundred and twenty (320) applied for in his own name, at the expiration of six months from date if he so desires, at the rate of three dollars (\$3) per acre.

(Signed) PHILIP C. WADSWORTH. [SEAL]

Witnesses: E. J. YOUNG.

JOHN HARRIMAN.

—and at the same time agreed that if the plaintiff should, within six months after the date of the sale, be dissatisfied with the lands sold to him by the defendant, he, the defendant, would purchase the same upon the terms set forth in the agreement. The lands referred to and described were applied for and purchased under the agreement, and, in accordance with the terms of such purchase from the state, the plaintiff delivered certain promissory notes, etc., and made the purchase, and entered into the agreement, relying solely upon the representations of the defendant, and upon his written promise to repurchase the land as set out in the agreement. The plaintiff, after examining such land, was dissatisfied therewith, and notified the defendant of his desire that he should repurchase

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the same in accordance with the terms of his agreement, and the defendant then promised in writing to so repurchase the land, and further promised to assume the promissory notes given to the state for a part of the purchase price. The defendant did not comply with his agreement, and has wholly failed and neglected to repurchase the land at the price named, or for any other sum, and prior to the commencement of this suit the plaintiff tendered to the defendant a conveyance of the property and demanded that he repurchase the same in compliance with his agreement, and he has failed and refused to carry out the agreement. It also appears that the plaintiff has tendered to the defendant the transfer of said property, subject to the payment of said promissory notes by the defendant, and that such tender was refused. These facts are based on the testimony of the plaintiff, which is uncontradicted. At the time of the sale the plaintiff was engaged in the business of school teaching at Portland, and was unable to examine the lands owing to their location in a distant part of the state, and being unwilling to buy them without seeing the same, the defendant, to induce him to make the purchase, made the agreement in writing set out. At the expiration of the school term, the plaintiff examined the lands and found them utterly unfit for the purpose for which they had been purchased. The defendant introduced no testimony, and relies solely upon technical suggestions to defeat the enforcement of the agreement.

One of the objections, as before stated, is that the agreement set out is wanting in mutuality. The decided cases show that the rule as to mutuality is greatly circumscribed by numerous limitations, and that a conditional or unilateral contract may come within these exceptions: 2 Beach, Equity Jurisprudence, § 586; Waterman on Specific Performance, § 200. The principle is well settled that where an owner of land gives another, for a sufficient con-

sideration, an option or privilege for the purchase of land within a given time, in writing, with a full knowledge of the fact that he is bound and the other party is not, it is such a contract as will be enforced in equity at the instance of the party holding the option. As Mr. Justice NEWMAN asks, "Does such a contract indeed lack mutuality? The seller for a fair consideration agrees to give the proposed purchaser a certain fixed time in which to make the contract mutual by acceptance of the offer to sell. If he accepts within the specified time, both parties are fully bound": *Johnston v. Trippe*, 33 Fed. Rep. 536. In *Hill v. Center*, 40 Cal. 67, the court says: "If the owner of an estate has fairly made a contract for a sufficient consideration received by him, by which contract he has himself stipulated that another person may, at the option of the latter, receive a conveyance of the estate upon the payment or tender of a fixed sum within a given time, what principle of equity is violated by making the owner comply with his contract? If the other party has obtained the option, he has fairly bought it and paid for it, and there is no principle or policy of law violated in its purchase." See also *Hawralty v. Warren*, 18 N. J. Eq. 124; *Clason v. Bailey*, 14 Johns. 484; *Schroeder v. Gemeinder*, 10 Nev. 355; *Pomeroy*, Specific Performance, § 169. In the case at bar the defendant sold the land to the plaintiff, and to protect him in case of dissatisfaction therewith, he gave him the option to disaffirm the contract if he so desired, in which event the defendant agreed to repurchase it. After the plaintiff notified the defendant that he was dissatisfied, and expressed the desire that he should repurchase the land in accordance with the terms of the agreement, the offer of the defendant to purchase was accepted by the plaintiff; so that when the plaintiff exercised the option within the time specified, the minds of the parties met, and the contract became mutual and enforceable by either party. We think, therefore, the contract as thus made,

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the other conditions existing, is a proper subject of specific performance.

5. The last contention is that the agreement sought to be enforced is void because it does not state the consideration. The statute provides that an agreement for the sale of land is void unless the same, or some memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged, etc.: Hill's Code, § 785. Under statutes of this character it has been held that if, from the terms of the writing, the consideration for the promise is inferable, it is expressed in such agreement within the meaning of the statute. And, while we think the consideration is apparent from a reasonable construction of the terms of the contract, yet the agreement, being under seal, the seal is itself the expression of a consideration sufficient to satisfy the statute. There are numerous authorities which show that it has been repeatedly held that the words "for value received" sufficiently comply with statutes like ours which require the consideration to be expressed: *Day v. Elmore*, 4 Wis. 214; *Watson v. McLaren*, 19 Wend. 557; *Miller v. Cook*, 23 N. Y. 495; *Osborne v. Baker*, 34 Minn. 307 (25 N. W. Rep. 606); *Brooks v. Morgan*, 1 Har. (Del.), 123; *Whitney v. Stearns*, 16 Me. 394. The text writers also generally state the law to be that the words "for value received" sufficiently express the consideration: 1 Reed, Statute of Frauds, § 430; Brown, Statute of Frauds, § 408a; Daniel, Negotiable Instruments, § 1767; 3 Parsons, Contracts, 16; Brandt, Suretyship, § 70. It is the law, too, that the seal is a sufficient expression of the consideration: Reed, Statute of Frauds, § 431. "We have held again and again," said COWAN, J., "that a seal expresses a consideration within the meaning of the statute": *Douglas v. Howland*, 24 Wend. 45. If the memorandum is under seal, the implication of consideration therefrom is sufficient: Brown, Statute of Frauds, § 408a. WOODRUFF, J., said: "An instrument

under seal is held not void under the statute, although no consideration is in terms stated therein, upon the ground that the seal imports consideration. It is sufficient if, upon the face of the instrument, consideration is a necessary legal implication": *McKenzie v. Farrell et al.* 4 Bosw. 207. The object of the statute of frauds was to prevent the facility to fraud and perjury to which contracts dependent upon the memory of witnesses were exposed, by requiring them to be reduced to writing. When this is done, there does not seem to be any reason why the consideration might not be proved by parol, as in the case of any other contract, or, if there is any reason for expressing the consideration, the true one ought to be expressed; yet the authorities cited show that the words "for value received," or that a seal itself, sufficiently expresses the consideration. The fact is, as MITCHELL, J., said: "The expression of the consideration is so unnecessary in order to prevent the mischief aimed at, that the courts have always been inclined to give this provision of the statute a very liberal construction, which sometimes, as in the instances cited, reduces it to a mere formality": *Osborne v. Baker*, 34 Minn. 307 (25 N. W. Rep. 606). In view, therefore, of the authorities, we think the seal sufficiently expresses the consideration within the meaning of the statute.

The decree is **AFFIRMED**.

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[Decided September 12, 1893; rehearing denied November 13, 1893.]

WILSON v. CITY OF SALEM.

[S. C. 34 Pac. Rep. 9.]

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1. **CONSTITUTIONALITY OF CITY CHARTER—NOTICE.**—A city charter giving power to improve streets at the expense of the abutting property is not unconstitutional, as depriving persons of property without due process of law, because it does not expressly provide for notice to the property owners; for the power of improving the streets and assessing the property therefor must be exercised subject to constitutional limitations, and notice must be given, notwithstanding the charter does not specially require it, though the city will have a broad discretion with reference to the kind of notice and the manner of giving it.
 2. **FRONTAGE ASSESSMENT FOR STREET IMPROVEMENTS.**—An assessment by the front foot is valid and constitutional under a city charter providing that each lot or part thereof shall be liable in whole or in part for the cost, as the council may determine, of making a proposed improvement upon the half-street in front thereof, and that the council may assess upon each lot or part thereof its proportionate share of said costs. The rule for assessing the expense not having been prescribed, the assessment may be made by the front foot in the discretion of the city authorities, if that mode seems to them most likely to determine the actual cost. *King v. City of Portland*, 2 Or. 146, cited and approved.
 3. **STREET IMPROVEMENTS—ESTOPPEL.**—Property owners who have had notice and an opportunity to be heard in regard to an assessment for a public improvement, will not be granted relief in a court of equity against such assessment as unequal and unjust, where they failed to appear and make their objection at the proper time. They are estopped by their own conduct from alleging any irregularities in the proceedings; and will be heard only to show that proceedings are totally void.

Marion County: GEO. H. BURNETT, Judge.

This is a suit by J. Q. Wilson and others to restrain the execution of a warrant for the sale of plaintiffs' property for delinquent street assessments, commenced after the work had been completed and accepted by the city, and the property advertised for sale. The case comes here on an appeal from a decree in favor of the plaintiffs given by the court below after sustaining their demurrer to the answer, and defendant refusing to further plead. From the complaint and answer it appears that some time prior

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to the fourteenth day of March, 1892, the city of Salem gave notice that on said day it would receive bids for the improvement of Chemeketa Street according to the plans and specifications on file in the city surveyor's office. After the bids had been received, and the probable cost of making the proposed improvement thus ascertained, the recorder, on the fifteenth day of March, 1892, in pursuance of the terms of an ordinance passed in 1891, entitled "An ordinance to provide for notice to parties in relation to assessments for street improvements," duly published, as in the said ordinance provided, the following notice:—

"NOTICE OF ASSESSMENT.

"Notice is hereby given that the common council of the city of Salem, Oregon, will at 8 o'clock P. M. of the fifth day of April, 1892, at the common council chambers at Salem, Oregon, proceed to assess upon each lot, or part thereof, liable therefor, its proportionate share of the cost of grading, graveling, and curbing all that part of Chemeketa Street described as follows: [Here follows a particular description of that portion of the street to be improved, according to the plans and specifications thereof, on file in the office of the city surveyor of Salem, Oregon.] Done by the city of Salem, Oregon, this fifteenth day of March, A. D. 1892. M. E. GOODELL, Recorder."

At the time and place stated in the notice, the council convened for the purpose indicated, but a quorum not being present, adjourned until the following day, when it proceeded to ascertain and determine, and did then and there determine, the proportionate share of the cost of making the proposed improvement, to be assessed upon each lot, and part thereof, liable therefor, by estimating the same according to frontage, none of the plaintiffs appearing or making any objections thereto.

On the third day of May, 1892, the council passed

Opinion of the court—BEAN, J.

ordinance number two hundred and forty-two, for the improvement of the street, in which it declared that it was expedient to grade, gravel, and curb the street, and do all things required by the specifications, except that selected gravel was substituted for screened gravel; that the proposed improvement should be made wholly at the expense of the abutting property, and be assessed upon said property "in proportion to the number of front feet abutting on the street"; and that the probable cost thereof was seven thousand and eighty-four dollars. This ordinance also declares the proportionate share of the cost of making such improvement, assessed upon each lot, or part thereof, liable therefor, as previously ascertained and determined by the council, except that a reduction was made on account of the change in the specifications from screened to selected gravel, and directs the recorder to enter a statement thereof in the docket of city liens. It also recites that Archie Mason is the lowest and best bidder for the work, and awards the contract to him for seven thousand and eighty-four dollars. The improvement was completed in pursuance of this ordinance, and accepted by the city. The validity of this assessment is challenged by the plaintiffs, who are the owners of property abutting upon this street, and who, being residents of Salem, had actual knowledge of said improvement as the same was being made. The decree of the court below was in favor of plaintiffs, and the city appeals. Reversed.

D'Arcy & Bingham, and J. J. Shaw, for Appellant.

Reuben P. Boise, and Tilmon Ford, for Respondents.

MR. JUSTICE BEAN delivered the opinion of the court:

The only question necessary to consider on this appeal is one of jurisdiction, and notice to interested parties; for if the city had power to make the improvement, and in doing so violated no express provision of its charter, and

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the abutting property owners had notice of, and an opportunity for, a hearing upon the question as to the proportionate share of the cost of the proposed improvement to be assessed against their property before the same became irrevocably fixed, a court of equity will not, after the work is completed, restrain the enforcement of the assessment on account of irregularities in the proceedings. The provisions of the charter of the defendant bearing on the question before us, in force at the time of this improvement, are as follows: "Section 46. The council is authorized to improve or repair any street or part thereof whenever it deems it expedient, and to declare by ordinance before doing the same whether the cost thereof, in whole or in part, shall be assessed upon the adjacent property or be paid out of the general fund of the city. Section 47. If the council declares that a proposed improvement or repairs shall be at the cost, in whole or in part, of the adjacent property, the proposed improvement or repairs shall be made accordingly; but if it declares that the cost thereof, in whole or in part, shall be paid out of the general fund, such repairs may be made as the ordinance may provide, and be paid for accordingly. Section 24. Whenever the council of the city of Salem deems it expedient to improve a street or part thereof, it may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor, its proportionate share of such costs. Section 38. Each lot or part thereof within the limits of a street * * * shall be liable for the cost, in whole or in part, as the council may determine, of making a proposed improvement upon the balance of a half street in front. Section 25. Whenever the probable costs of the improvements have been ascertained and determined, and the proportionate share thereof of each lot or part thereof has been assessed, as provided for in section 24, the council must declare the same by ordinance, and direct the

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city recorder to enter a statement thereof in the docket of the city liens, as provided for in the next section. Section 11. A sum of money assessed for the improvement of a street cannot be collected until, by order of the council, ten days' notice thereof is given by the recorder by the publication in a weekly or daily newspaper, published in the city of Salem. Such notice must substantially contain the matters required to be entered in the docket of city liens concerning such assessment. Section 12. If, within five days from the final publication of the notice prescribed in section 11, the sum assessed upon any lot or part thereof is not wholly paid to the city treasurer, and a duplicate receipt therefor filed with the recorder, the council may thereafter order a warrant for the collection of the same to be issued by the recorder, directed to the city marshal or other person authorized to collect taxes due the city."

1. These provisions of the charter contain a general grant of power to improve a street at the expense of the abutting property, and the mode of its exercise is not restricted, except as to the manner of making the cost thereof a charge upon the abutting property. The wisdom and expediency of the improvement, the character and cost of the work, the manner of letting the contract or doing the work, are all matters of legislative control, and vested by the charter in the discretion of the council, and upon which the property owners have no constitutional or charter right to be heard: *Paulsen v. City of Portland*, 149 U. S. 30 (13 Sup. Ct. Rep. 750); *Spencer v. Merchant*, 100 N. Y. 585 (3 N. E. Rep. 682; S. C. 125 U. S. 345; 8 Sup. Ct. Rep. 92). It is contended, however, that the charter is unconstitutional because it makes no provision for notice at any stage of the proceedings to the property owners. We do not understand that it is essential to the validity of a city charter, granting power to improve a street, that it should contain a provision for notice to the property owners. It is enough

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if the power is granted in general terms, for, as was said by Mr. Justice BREWER in the recent case of *Paulsen v. City of Portland*, "the city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore v. Hentig*, 33 Kan. 156 (5 Pac. Rep. 781), where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, it was held that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same": See also *Cleveland v. Tripp*, 13 R. I. 50; *Williams v. Mayor of Detroit*, 2 Mich. 560; *Gatch v. Des Moines*, 63 Iowa, 718 (18 N. W. Rep. 310). Under a general grant of power to do work of this kind, the city may by ordinance, as was done in this case, provide for notice to the property owner, and the rule is that if provision is made "for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law": *McMillen v. Anderson*, 95 U. S. 37; *Davidson v. New Orleans*, 96 U. S. 97; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701 (4 Sup. Ct. Rep. 660); *Spencer v. Merchant*, 125 U. S. 345 (8 Sup. Ct. Rep. 921). Now in this case notice and an opportunity to be heard were given to the plaintiffs in pursuance of an ordinance of the city providing therefor, and prescribing its terms, before any assessment was made or attempted to be made. They did

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not see fit to avail themselves of the opportunity thus afforded, but now seek relief in a court of equity because, as they allege, the assessment as made was unequal and unjust. This they cannot be allowed to do. Having had notice and an opportunity to be heard, they should have appeared before the council and made their objection at the proper time, and not having done so are now bound by the assessment.

2. It is next contended that the assessment in this case is void because made according to frontage. Section 38 provides that each lot or part thereof shall be liable in whole or in part for the cost, as the council may determine, of making a proposed improvement upon the half-street in front thereof; and section 24 provides that the council may assess upon each lot or part thereof liable therefor, its proportionate share of said cost. It thus seems that the rule for estimating the cost of making the improvement in front of a lot or part thereof, and the proportionate share to be assessed thereon, is not prescribed by the charter, but is left to the judgment and discretion of the council. In such case an assessment by the front foot is held valid and constitutional by numerous authorities. And while it may be admitted that such a measure of apportionment seems arbitrary, and likely to operate inequitably in some cases, and liable to other objections of more or less validity, yet, as Judge COOLEY says, "the question is a fairly debatable one whether they are likely to be more serious or more frequent than those which are to be anticipated from the selection of some other rule": Cooley, *Taxation*, 451. And this question must be deemed settled by the legislative judgment of the council, where no mode is prescribed by the charter: *King v. City of Portland*, 2 Or. 146; *Sheley v. City of Detroit*, 45 Mich. 431 (3 N. W. Rep. 52); *Norfolk City v. Ellis*, 26 Gratt. 224; *Davis v. City of Lynchburg*, 84 Va. 861 (6 S. E. Rep. 230); *Farrar v. City of St. Louis*, 80 Mo. 379.

3. But whatever may have been the equitable or just mode of assessment under the charter, the one actually adopted by the city, if unwise, was at most only an irregularity which might have been corrected if brought to the attention of the council by plaintiffs at the proper time, but having neglected to do this, we think they are now estopped from objecting to the assessment as actually made. They had notice of the intended assessment, and an opportunity to be heard before it was made, and, not having availed themselves of the opportunity thus given, they are chargeable with knowledge of the method adopted by the city, and, having suffered the work to proceed to final completion and acceptance without protest or objection, and having thus received the benefit of the improvement in the enhanced value of their property, they are now estopped from contesting the validity of the assessments: 2 Hermann, Estoppel, § 1221; Elliott, Roads and Streets, 420; *Kellogg v. Ely*, 15 Ohio St. 64; *People v. Utica*, 65 Barb. 9; *Darst v. Griffin*, 31 Neb. 668 (48 N. W. Rep. 819); *Loder v. McGovern*, 48 N. J. Eq. 275 (22 Atl. Rep. 199; 27 Am. St. Rep. 446); *Taber v. Ferguson*, 109 Ind. 227 (9 N. E. Rep. 723); *Prezinger v. Harness*, 114 Ind. 491 (16 N. E. Rep. 495).

In this case the council had jurisdiction under the charter to make the improvement at the expense of the abutting property, and the plaintiffs had notice and were given an opportunity to be heard before the assessment was made. This being so, it is now too late to take advantage of any irregularity which may have occurred in the proceedings. "The weight of authority," says Judge ELLIOTT, "is very decidedly in favor of the rule that where there is jurisdiction, the property owner who sees the improvement made and offers no objection until after the work has been done, cannot defeat the assessment upon the ground that the proceedings have not been regular":

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Elliott, Roads and Streets, 419. If any irregularities or informalities occurred in the proceedings of the council in directing the work, or by including in ordinance number two hundred and forty-two matter that should have been in a separate ordinance, or in changing the specifications from screened to selected gravel after the assessment was made, or in any other particular not affecting the jurisdiction, it would be unjust and inequitable, after the work has been completed and accepted by the city, for a court of equity to restrain the collection of the assessment. The plaintiffs, who are residents of Salem and had actual knowledge that the work was being done, have stood by and seen the street improved for the benefit of their property without objection, and now ought not to be allowed to shift the burden of making the improvement from themselves to the general taxpayers of the city. Assessments for street and other similar improvements are upheld upon the theory that the property within the assessment district is benefited in a special and peculiar manner in a sum equal to the amount assessed against it, and that the owner has thus received a peculiar and pecuniary benefit by the improvement which the citizens generally do not share. Unless, therefore, the proceedings under which the improvement was made are so radically defective as to be totally void, the property owner who stood by and received the benefit with apparent willingness will be estopped to assert the invalidity of such proceedings. "He cannot enjoy the benefits and escape the burden," says MITCHELL, C. J., "unless he interferes or gives notice before the benefit is received": *Foss v. Stackhouse*, 114 Ind. 200 (16 N. E. Rep. 501). Whatever plaintiffs' rights may have been in the beginning, they have stood by and acquiesced until the rights of others have intervened, and they must now in equity be deemed to have made an effectual election to waive any and all irregularities in the proceedings under which such rights

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have been acquired. This, it seems to us, disposes of the question of the validity of the assessment; for, as soon as it is ascertained that the council had jurisdiction to make the improvement, and the property owner an opportunity to be heard on the question of his assessment, the other objections are mere irregularities which cannot now be urged in a suit to restrain the tax, but which might and should have been raised by some proper proceeding before the work was completed.

It is claimed, however, that the warrant under which plaintiffs' property was advertised for sale was prematurely issued, because no order was ever made by the council authorizing or directing the publication of notice of the assessment as required by section 11 of the charter. The notice required by this section was evidently designed to give the property owner an opportunity to pay the assessment before any costs should be made thereon, and is therefore a condition precedent to the right to order a warrant for the collection of the same to issue. It is not alleged that the notice was not in fact given, and it affirmatively appearing that an order was made by the council directing the warrant for the collection of the assessment to issue as required by section 12, which could only be done after the publication required by section 11, it would of itself probably operate as a ratification. But however this may be, the answer denies the allegations of the complaint as to the want of an order by the council authorizing and directing the notice to be published, and affirmatively alleges that the notice was given in all respects as required by the charter, and as the case is here on a demurrer to the answer, this allegation must be taken as true for the purpose of this opinion, and we must therefore assume that the order authorizing the publication of the notice was in fact made.

It follows from what has been said that the decree of the court below must be reversed and this cause remanded

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for further proceedings not inconsistent with this opinion.
REVERSED.

ON REHEARING.

[S. C. 24 Pac. 691.]

MR. JUSTICE BEAN delivered the opinion of the court:

A petition for rehearing has been filed, in which it is contended that the mode of making an assessment for street improvements is provided by the charter, and therefore an assessment by the front foot is invalid and void. The rule is undisputed that if the charter prescribes a mode or rule for ascertaining the cost of making a proposed street improvement to be assessed against the adjoining property, that mode must be pursued and the council cannot adopt another. But from a careful re-examination of the charter under consideration in this case, we are still of the opinion that its only effect is to declare that the property shall be liable for the cost of making a proposed improvement upon the half-street in front thereof, and to vest the power in the council of ascertaining and assessing such cost upon each lot or part thereof. The charter nowhere prescribes a rule or mode which the council shall adopt in estimating or ascertaining the cost of making the improvement, and in the absence of such a provision it is at liberty to adopt the mode which seems to it most likely to determine the actual cost of making an improvement in front of the property to be assessed, and if the mode adopted by the council in the case was inequitable or unjust it is now too late for the property owner to complain, as he had an opportunity to be heard before the assessment was made. The former opinion of the court is therefore adhered to, and the cause will be remanded as therein directed. REVERSED.

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[Decided September 12, 1893; rehearing denied October 23, 1893.]

BARKLEY v. OREGON CITY.

[S. C. 83 Pac. Rep. 978.]

24	515
26	301
26	414
33*	978
38*	127
38*	408
24	515
39	604

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—NOTICE—MATERIAL.—Abutting property owners cannot complain of a change in the material used in a street improvement from that named in the original notice of intention to improve, where the material adopted is cheaper and more serviceable than the original.
2. MUNICIPAL CORPORATIONS—SIGNATURES TO NOTICE.—A provision in the charter of a city allowing a street improvement to be made when the owners of two thirds of the adjoining property petition for it, requires the petition to be signed only by the owners of two thirds of the property, and not by two thirds of the whole number of owners.
3. ASSESSMENTS—CONSTRUCTIVE NOTICE.—Where an assessment has been made in accordance with the provisions of law, the fact that the property owners thereby affected had no actual knowledge of what was done, is immaterial,—they are chargeable with constructive notice.
4. NOTICE OF MEETING TO EQUALIZE ASSESSMENTS—PRESUMPTION.—In a suit to restrain the collection of street assessments, where the record shows that the council fixed a time for the meeting to equalize the assessments, and the complaint does allege that the notice was not given, it will be presumed that the required notice of the meeting was given.

Clackamas County: LOYAL B. STEARNS, Judge.

This is a suit by Ida M. Barkley and others to restrain the collection of an assessment for grading and improving Seventh Street in Oregon City. The plaintiffs are owners of lots in said city upon which the assessment is a lien, and they ask for a perpetual injunction against its collection upon the ground that the proceedings preliminary to the levy thereof have not been in accordance with the charter of the city, which prescribes the several steps to be taken in such cases. The material facts are that on the fourth of March, 1891, a petition praying for the establishment of a grade and the improvement of said street was presented to the city council, which was on the eighteenth of said month granted, and the recorder ordered to give the proper notice of the intention of the

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council to make said improvement. The notice so ordered was published in the Oregon Courier, a newspaper of said city, in its issues of the twentieth and twenty-seventh of March, and stated, among other things, that said street when graded should be covered with crushed rock. The city being the owner of several tracts of land adjoining said street, in order to comply with the provisions of the charter requiring the owners of two thirds of the adjoining property to join in the petition, on the twenty-second of April, by authority of the council, the mayor and recorder signed said petition on behalf of the city, whereupon the council by resolution declared that said petition had then been signed by the owners of two thirds of the adjoining property, and the said notice was republished in the same newspaper for four successive weeks. On the sixth of May an ordinance establishing the grade of said street was introduced, and, by order of the council, was thereafter published in said paper, and on the twentieth of June was passed and approved. At its meeting on the twentieth of June the council, having under consideration the improvement of said street, made and caused to be entered in its records the following order: "It appearing that the owners of two thirds of the property have signed the petition for the improvement of Seventh Street, the council proceeded to assess and declare the assessment on the adjacent property for the improvement of said street." At the same meeting of the council an ordinance declaring the assessment on the adjacent property for the improvement of said street was introduced, and, by order, published in said paper, and on the fifth of August passed and approved, and the recorder, by order of the council, entered said assessment in the docket of city liens, and published notice thereof in said paper. On the thirteenth of July an ordinance providing for the manner of improving said street was introduced, and, by order, published in said paper, and on the fifth of August was passed and

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approved, and the recorder, by order of the council, published a notice inviting sealed bids for the work, and, in pursuance thereof, a contract was duly let for said improvement. This ordinance and contract provided for grading said street and covering it with gravel instead of crushed rock, as prescribed in the published notice. No remonstrance against said improvement was ever presented to the council by any one prior to the commencement of this suit, though the plaintiffs live in said city, saw the improvement as it was being made; and not until the contractor had completed about four fifths of the work was this suit commenced by twelve plaintiffs, of whom five had signed said petition. A temporary injunction was granted, which the court upon the trial dissolved, and rendered a decree dismissing the complaint, from which the plaintiffs appeal. Affirmed.

C. D. & D. C. Latourette, Geo. C. Brownell, and G. E. Hayes, for Appellants.

Harvey E. Cross, and Emmet B. Williams (Richard Williams, and Chas. H. Carey on the brief), for Respondents.

MR. JUSTICE MOORE delivered the opinion of the court:

Did the council have jurisdiction to make the improvement? is the question presented by this appeal. The charter of Oregon City furnishes two methods for acquiring jurisdiction to make street improvements: (1) Sections 67-71 provide that the council may make street improvements by publishing a notice of its intention, particularly describing the street and character of the improvement, in four issues of some weekly newspaper of said city, and if no remonstrance from the resident owners of two thirds of the property abutting on said street be presented within ten days from the final publication of said notice, the council shall have authority to make the

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improvements described in the notice; (2) Section 93 provides that when the owners of two thirds of the property adjoining a street shall in writing petition the council to establish a grade or improve a street, the same may be done without giving any notice. When the owners of two thirds of the adjacent property signed the petition, jurisdiction was given the council to make the improvements prayed for, and accomplished the same result that could have been obtained by the publication of a notice, and the failure to remonstrate. The record shows that the notice of intention to improve with crushed rock was republished for the required period after the petition was signed on behalf of the city, and it must be presumed, in the absence of any allegation to the contrary, that such notice was published by order of the council, and hence it acquired jurisdiction to make the improvement described in the notice.

1. Appellants contend that the petition was altered without their consent, after it had been signed by the petitioners, and that the council had no jurisdiction to make said improvement with gravel. The petition shows that the words, "to said grade and improved with gravel," had been interlined therein, and much evidence was taken to show that this change had been made after it had been signed by the petitioners. The evidence shows that one T. P. Randall wrote the petition, and, upon consultation with the mayor, it was agreed that it should state the kind of improvement intended, whereupon Mr. Randall, in the presence of the mayor, made the interlineation before any names had been secured thereto. The mayor and Mr. Randall both testify to this fact, while other witnesses testify that they have no recollection of seeing the interlineation when the petition was submitted to them. We think it conclusively appears from the evidence that the petition contained the interlineation before any person signed it, and was sufficient to give the council

jurisdiction to make the improvement with gravel. Jurisdiction was acquired by the publication of the notice to grade the street to the established grade for its full width and cover it with crushed rock, and by the petition for the same grade with a cover of gravel. Appellants contend that since the notice prescribed crushed rock the council had no authority to substitute gravel therefor. "If," says Judge ELLIOTT, "power is conferred upon the council, and two methods of exercising it are prescribed, it will be sufficient to sustain the assessment if it affirmatively appears that it was well executed in either of the modes prescribed": Elliott on Roads and Streets, 378. The council adopted gravel, and the plaintiffs cannot have been injured thereby unless the cost of making the improvement with it exceeded that of crushed rock, or unless the latter material was superior to gravel for street purposes. The evidence shows that the rock available for that purpose was rotten, would soon be ground into powder, was not so serviceable, and would cost when laid upon the street thirty cents per cubic yard more than gravel. From this it would appear that there was a double advantage in the use of gravel in consequence of its superiority and cheapness.

2. Appellants attack the petition, and attempt to show by evidence that it did not contain the names of the owners of two thirds of the adjacent property. They allege in their complaint that after the petition was signed by the mayor and recorder, "that such petition so constituted, then failed to contain the signatures of two thirds of the adjacent property owners on said street along the line of the proposed improvements." Assuming without deciding that they could attack the petition in a collateral proceeding, does their complaint present any issue upon this question? The charter provides that when the owners of two thirds of the adjoining property petition the council to improve a street, jurisdiction is thereby acquired for

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that purpose. It is the amount of property represented upon the petition, and not the number of names, which gives the council jurisdiction. If one person who owned two thirds of all the property adjoining a street should petition the council for its improvement, and any number of other property owners should remonstrate against it, the council would have jurisdiction to make the improvement. The complaint then raises no issue upon the question, and all evidence taken in support of said allegation was immaterial, and subject to respondent's exception to its introduction.

3. Appellants also contend that there is nothing in the record of the council's proceedings to indicate that the cost of said improvement was to be assessed against their property. Some testimony was offered by appellants tending to show that they had no knowledge that the proposed improvements would be assessed against their property, and a stipulation was entered into between the parties to the effect that each plaintiff would testify that he had no knowledge of any alleged defect in the proceedings of the city council relative to the street improvement until the contract therefor had been let. Admitting that they had no actual knowledge, they are chargeable with constructive notice of the fact if the provisions of the city charter have been observed. An ordinance was on the thirteenth of July, 1891, duly published in said paper, which provided "That there be and is hereby assessed on each of the following described lots and parts of lots lying on Seventh Street between High Street and the city limits, the amount severally indicated herein, and representing in the aggregate the probable cost of the proposed improvement of Seventh Street in Oregon City as hereinafter assessed and determined by the council, and the recorder is hereby instructed to enter the same in the docket of city liens." Then follow the names of the owners, a list of the property and the amount assessed against it. Sec-

tion 74 of the charter provides that in case the notice be for the improvement of a street or part thereof, the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor, its share of such cost; and section 75 provides that when the cost has been ascertained and determined, the council must declare the same by ordinance, and direct the recorder to enter a statement thereof in the docket of city liens. The improvement of a street must in all instances be made by an assessment upon abutting property. Section 96 provides that when any street is to be repaired, the council must declare, by ordinance, whether the cost thereof shall be assessed upon the adjacent property or be paid out of the general fund of the city. The repair of a street may, in the discretion of the council, be made from the general fund of the city or by assessment of the property. When a street is to be repaired, the council must declare, by ordinance, how it must be made; but when a street is to be improved, the council has no discretion in the matter, and must make it by assessment of the adjoining property. In the case at bar, the published notice provided for an improvement, and the petition prayed for the same; and when the council adopted an ordinance for the improvement of the street by assessing the adjoining property, it was a compliance with the provisions of the charter, and appellants had constructive notice from the provisions of the charter, from the published notice of intention to improve, from the petition, and from the published ordinance, that said improvements would be made at the expense of their property.

4. The record shows that at a regular meeting of the council held on the — of June, 1891, the following order was adopted: "Moved that the council sit as a board of equalization on the evening of the twentieth of June, 1891," whereupon the council adjourned to meet at that date. The council met at the time named, and an

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ordinance declaring the assessment was introduced and read at that meeting, but the record does not show that any notice was given the owners of the property affected by the assessment that said council would at that time sit as a board of equalization. The complaint does not allege that this notice was not given; but in the reply it is alleged that after the petition was filed, the plaintiffs had no notice or knowledge of any of the proceedings of the council in relation to said improvement until after the contract therefor had been let. The complaint does not raise the issue of a failure to give this notice; and since the record shows that the council fixed a time for the meeting to equalize the assessment, in the absence of any allegation to the contrary, it must be presumed that the council gave the required notice of such meeting.

Jurisdiction having been obtained to make the improvement, the right to levy the assessment is unquestioned. It is a fundamental principle, as old as Magna Charta, that before any person can be deprived of his property he must have an opportunity to be heard. In cases of assessment, this means that at some time and place he shall have a hearing, or an opportunity to be heard, before the assessment becomes irrevocably fixed (*Stewart v. Palmer*, 74 N. Y. 184; 30 Am. Rep. 289), not for the purpose of avoiding the burden cast upon his property by the improvement, but that it shall not bear an unequal portion. The ordinance declaring the assessment against the property was not passed or approved until the fifth of August, at which time the recorder was ordered to enter the assessment in the docket of city liens, and it thereby became irrevocably fixed. If at any time prior to the approval of the ordinance the appellants had an opportunity to be heard upon the question of the proportion of the burden which their property should bear, this was their day in court," and the assessment would have been made by "due process of law." Notice of the time and place of meeting for the purpose of

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equalizing the assessment must in all cases be given, as it is the process by which jurisdiction is given to determine what proportion of the burden each tract should bear. The council having jurisdiction to make the improvement and apportion the expense thereof, the assessment is valid, and it follows that the decree must be **AFFIRMED**.

[Argued July 24, 1893; decided October 20, 1893.]

DUZAN v. MESERVE.

[S. C. 34 Pac. Rep. 548.]

1. **SALE—PLEADING.**—A complaint alleging a sale of plaintiff's right, title, and interest in certain chattels, and a taking possession by defendant, is sufficient without alleging what interest plaintiff owned.
2. **STATUTE OF FRAUDS—MEMORANDUM OF SALE—TAKING POSSESSION.**—An agreement for the sale of property exceeding fifty dollars in value need not be in writing, where the purchaser takes possession of it.
3. **AUTHORITY OF PARTNER—EVIDENCE OF RATIFICATION.**—The fact that a firm took possession of property that one of the partnership had purchased tends to show his authority to bind the firm, or, at least, their ratification of his acts.
4. **INTEREST—VERDICT.**—Failure to fix a rate of interest in a verdict awarding damages with interest thereon from a given date, does not invalidate it as interest in such case must be computed according to the rate provided by law.
5. **REMITTING PART OF VERDICT—INTEREST.**—Error allowing interest in a verdict for a longer period than is proper is not reversible error where the excess of interest has been remitted.

Columbia County: **THOMAS A. McBRIDE**, Judge.

This is an action by L. D. Duzan to recover the sum of five hundred dollars from Lincoln Meserve and others, alleged to be due on the sale of their right, title, and interest in and to certain mill machinery which was then in their possession under a contract of sale with J. M. Arthur & Co. of Portland, Oregon. The cause was tried upon the issues joined by the pleadings, and resulted in a verdict and judgment for the plaintiffs. **Affirmed.**

Opinion of the court—LORD, C. J.

W. B. Dillard, for Appellants.

John F. Caples (Hartwell Hurley, and Greenbury W. Allen on the brief), for Respondents.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. The first ground of error relied upon is the insufficiency of the facts stated to constitute a cause of action. The complaint alleges in substance, that on the ninth day of November, 1890, the plaintiffs, as partners, sold and delivered to the defendants, as partners, their right, title, and interest in and to certain personal property (describing it), and also the right to use certain buildings, etc., for the agreed consideration of two thousand dollars; that in pursuance of such contract and sale the defendants took possession of said property, and agreed and promised to pay therefor the said sum of two thousand dollars in the manner following, to wit, "To assume and pay a certain indebtedness of said plaintiffs to J. M. Arthur & Co., consisting of a book account and certain promissory notes amounting to the sum of fifteen hundred dollars, and the further sum of five hundred dollars in cash to be paid said plaintiffs by said defendants within thirty days from and after the said ninth of November, 1890." The objection is that the plaintiffs' right of ownership in the property is undefined, and that the allegation "took possession" does not assist the averment, as the possession taken might be tortious. We do not think either objection is well taken, although the allegations might be more definitely expressed. The allegation is not intended to convey the idea of absolute ownership, but only of the sale and delivery of the plaintiffs' right and interest in the property of which they are in the possession. The property was mill machinery. The plaintiffs allege that they sold and delivered, for the consideration stated, their right and

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interest in said property, and that in pursuance of such contract and sale defendants took possession of it. We cannot say that possession taken under such contract and sale is tortious. We think, therefore, the complaint stated a cause of action.

2. Other objections relate to alleged erroneous rulings in the progress of the trial. It is claimed that the court erred in overruling the defendant's objection to the testimony of several witnesses tending to show an oral agreement between the plaintiffs and defendants, on the ground that the price was over fifty dollars, and hence that the statute required such agreement to be in writing. The bill of exceptions shows that the plaintiffs made a contract with J. M. Arthur & Co. by which the plaintiffs agreed to buy from Arthur & Co., and Arthur & Co. agreed to sell to the plaintiffs, the property in question for the sum of fifteen hundred dollars; and that it was delivered to the plaintiffs under such contract, and put into a mill in Columbia County, Oregon, where it was being operated at the time of the sale by plaintiffs to the defendants. It also tends to show that the plaintiffs contracted to sell to the defendants their right and interest in the mill machinery, and also in the buildings, for the sum of five hundred dollars, with the understanding that satisfactory arrangements could be made with Arthur & Co. for the payment of the amount due them. The latter, after being made acquainted with the facts, gave an order of which the following is a copy:—

“PORTLAND, July 25, 1890.

“MESSRS. DUZAN & KAISER:

“GENTLEMEN—For value received the undersigned has this day assigned and transferred to Lincoln Meserve, William Meserve, Joseph Meserve, Hawley E. Meserve, and James Meserve, partners by the name of Meserve Brothers, the right to demand and recover from you the

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possession of all the machinery and personal property entrusted to your care by the undersigned by contract entered into between you and the undersigned on the thirteenth day of May, 1890, by the terms of which you were entrusted by the undersigned with the possession and care of said property. You will therefore please deliver the possession of said machinery and personal property to said Meserve Brothers, and oblige.

“Yours respectfully,

“J. M. ARTHUR & Co.”

In connection with this order, and executed at the same time, was the following writing:—

“J. M. Arthur & Co., dealers in machinery and supplies.

“PORTLAND, OREGON, July 25, 1890.

“MESSRS. J. M. ARTHUR & Co.:

“GENTLEMEN—We are knowing to and cognizant of the agreement between you and Meserve Brothers. It is satisfactory to us, and we came up for this special purpose, and they have come also for this special purpose.

“Yours respectfully,

“DUZAN & KAISER.”

The record discloses that both said papers were executed at the same time, and in the presence of the plaintiff Kaiser and the defendants Lincoln Meserve and William Meserve. In view of these facts and the writings, when the defendants took possession of the property they accepted and received the plaintiffs' right, title, and interest therein, and thus obviated the objection that the agreement was not in writing.

3. Objection is also made to the statement of one of the defendants, while a witness, in regard to the existence of the partnership, and the agreement to pay the plaintiffs five hundred dollars for their right and interest in the

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machinery and other property. The record discloses that the negotiations for the purchase of the plaintiffs' interest in the property was conducted by one of the defendants, and that the agreement to sell for the consideration already named was made with him as the representative of Meserve Brothers, in case satisfactory arrangements could be effected with Arthur & Co. The point of the objection is that no authority is shown in such defendant and witness to bind the other defendants as a firm, but whether this was so or not at the time of the alleged contract, their subsequent agreement with Arthur & Co., and its ratification by the plaintiffs, and their taking possession of the property, including the interests of the plaintiffs under such arrangements, tended to show his authority to bind the defendants as a firm, or, at least, to show their ratification of his authority so to do. The other rulings are substantially covered by the principle involved in this objection, and need no further reference.

4. The last assignment of error is that the verdict is uncertain and indefinite. The verdict is as follows: "We, the jury in the above entitled action, find for the plaintiff in the sum of five hundred dollars, with interest thereon since the ninth of November, 1890." Interest allowed by a verdict must be computed according to the rate provided by law, when no rate is specified. A failure therefore to fix a rate in the verdict did not invalidate it.

5. It is claimed, however, that the verdict should have been set aside for the reason that interest should have been allowed only from the ninth of December, 1890. The record discloses that after the defendants filed their motion for a new trial, plaintiffs filed a cross-motion in which they offered to remit the excess of interest, which was allowed, and the excess accordingly deducted. Under these circumstances the judgment will not be reversed on appeal when it appears that the error in the amount allowed by the verdict is inconsiderable and ascertainable.

The judgment must therefore be **AFFIRMED**.

Per Curiam.

[Argued July 28; decided October 23, 1893.]

LOGUS, ADMINISTRATOR, *v.* HUTSON.

[S. C. 34 Pac. Rep. 477.]

Clackamas County: FRANK J. TAYLOR, Judge.

Defendant appeals.

A. S. Dresser, for Appellant.*S. Huelet*, for Respondent.

PER CURIAM.—This is a suit in equity to quiet title to real property, under section 504 of the Code. The only question necessary to determine on this appeal is one of adverse possession. Both parties claim title through William Holmes, the original donation claimant—the plaintiff through a deed to one Holland made and recorded in 1859, and sundry mesne conveyances; and the defendant through a deed to Sarah Hood made and recorded in 1858, and a conveyance from her to him. The Holland deed described the land as “One acre of land lying on my land claim, bounded as follows: On the north by R. R. Thompson, on the east by lots owned by Jeffers, on the west by the county road,” and the Hood deed as “Lot number one in block number thirteen, as surveyed by L. F. Carter,” etc., but for the purposes of this case we may assume that both descriptions covered the same property.

The evidence shows conclusively, and, in fact, there is really no substantial dispute in the testimony, that Holland and his grantees, including the plaintiff, entered upon and have been in the open, exclusive, and adverse possession of the property described in the deed from Holmes to him and in dispute in this case, under a claim of title for more than ten years prior to the commencement of this

Statement of the case.

suit, and that neither the defendant nor his said grantor have been in possession of the property at any time since the deed from Holmes to Hood, nor did they suppose or claim that they owned any interest therein until it was discovered some time after the purchase by the defendant in 1883 that the deed from Holmes to Hood and from her to the defendant did not include the property supposed to be conveyed thereby, but the property in controversy. For this reason defendant now asserts title to the property in dispute, notwithstanding the fact that the location of the property purchased by him in 1883 was shown him before the purchase, and he entered upon and ever since has continued to occupy and improve the same. But as we have already suggested, his rights, if any, were long since barred by the statute of limitations, and the decree must be AFFIRMED.

[Argued October 17, 1893; decided October 23, 1893.]

ROWLAND v. HARMON.

[S. C. 34 Pac. Rep. 357.]

24 529
29 438

24 529
138 402
138 407

24 529
38 500

1. **MECHANICS' LIEN—NOTICE—NAME OF OWNER—CODE, § 3673.**—A lien which reads "I, R., have, by virtue of a contract made with H., with K. and L., his contractors, furnished material and done work in plastering" a certain house, states the name of the person to whom the material was furnished, since the statute makes the contractor the agent of the owner, and the meaning of the sentence can readily be made apparent by transposing some of its words.
2. **MECHANICS' LIEN—NOTICE—STATEMENT OF DEMAND.**—The fact that a claim of lien does not contain a true statement of the claimants' demand will not destroy the lien where the inaccuracy was neither wilful nor negligent, and there is an honest dispute about the amount that was really due. *Nicolai v. Van Fridagh*, 23 Or. 149, distinguished.

Multnomah County: LOYAL B. STEARNS, Judge.

Suit by R. J. Rowland against W. L. Harmon, a property owner, and Killam & Lewton, his contractors, to
XXIV. OR.—34.

Per Curiam.

foreclose a lien for labor and materials. From a decree for plaintiff, W. L. Harmon appeals. Affirmed.

J. F. Boothe, for Appellant.

Dell Stuart, for Respondent.

PER CURIAM.—This is a suit in equity to foreclose a mechanics' lien upon the lots described in the complaint. The facts show that during the year 1892 the defendant William L. Harmon entered into a contract with the defendants Killam & Lewton, as copartners, by the terms of which they undertook to erect for him a dwelling house upon lots eighteen and nineteen for the sum specified; that while constructing said building they entered into a contract with the plaintiff Rowland to furnish the material and do the plastering and foundation work of said house for the sum of four hundred and twenty dollars; that on the twenty-seventh day of October, 1892, the plaintiff filed with the recorder of Multnomah County a notice of lien upon said dwelling house and property for the sum of two hundred and seventy dollars.

1. The first objection assigned is that the notice of plaintiff's lien is defective in not naming the person to whom he furnished the materials. This objection is based on section 3673, Hill's Code, which provides, among other things, that the claim filed shall state * * * "the name of the person to whom he furnished the materials." The lien in this reads as follows:—

"Know all men by these presents, that I, R. J. Rowland, of the city of Portland, in the county of Multnomah, state of Oregon, have, by virtue of a contract heretofore made with Wm. L. Harmon of the county of Multnomah, Oregon, with G. C. Killam and T. C. Lewton, his contractors, furnished material and done work and labor in plastering of a certain dwelling house. The ground upon which said dwelling was erected being at the

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time the property of Wm. L. Harmon, who caused said dwelling to be erected, and who was the owner thereof."

* * * The following is a true statement of the demand due the claimant herein:—

For labor performed-----	\$200
For material furnished-----	225
Total amount of debts-----	\$425

DEDUCTIONS.

Paid in cash at different times, aggregating-----	\$150
Balance now due-----	\$270

It may be admitted that the statement in the notice to which the objection applies is faulty and illy constructed, but, in view of the fact that by said section the contractor is made the agent of the owner, its meaning is plain, and is easily made to so appear by transposing some of its words. We think the notice of the lien informs the defendant Harmon, and the public, that the materials were furnished by virtue of a contract made with him through his agents.

2. Another objection is that the notice of lien "does not contain a true statement of claimant's demand after deducting all just credits and offsets." This is based on the ground that the notice stated one hundred and fifty dollars as the sum to be credited, when the court found that the true sum was one hundred and fifty-two dollars and fifty cents. The facts are that there was a conflict in the evidence as to the amount that had been paid on the contract, the plaintiff claiming that he had received in cash at different times one hundred and fifty dollars, and the defendant Killam claiming that he had paid one hundred and fifty-two dollars and fifty cents. The court found that the defendant should have been credited with one hundred and fifty-two dollars and fifty cents under the rule of the preponderance of evidence, but that the plaintiff

Points decided.

was neither negligent nor wilful in failing to give credit for the disputed sum of two dollars and fifty cents, and that his contention was made in good faith. These facts do not bring the case within *Nicolai v. Van Fridagh*, 23 Or. 149 (31 Pac. 288), so as to invalidate the lien.

The decree is **AFFIRMED**.

[Argued July 19, 1893; decided October 23, 1893.]

PENGRA v. WHEELER.

[S. C. 34 Pac. Rep. 354.]

24 532
25 206
34* 354
35* 246
24 532
29 286
29 532

24 532
33 83
133 381
24 532
37 21

24 532
43 630

24 532
45 388
24 532
46 271

1. **INTEREST ON UNLIQUIDATED ACCOUNTS**—CODE, § 3587.—Where the amount of an account is unliquidated, and there is no express agreement to pay interest, there is no default in payment, and of course no interest, until the amount of the debt is made certain; thus, where a lease of a water power provides for the payment of a fixed sum quarterly, unless the supply of water be deficient, when there should be a proportionate reduction of rent, and in fact the water did partially fail, no interest can be allowed on unpaid installments of rent. *Hawley v. Dawson*, 16 Or. 344, cited and approved.
2. **MUTUAL ACCOUNTS—INTEREST**—CODE, § 3587.—Where a person owes for rent, and furnishes goods and makes repairs against his rent account, there is a case of mutual accounts, and no interest can be allowed either party until the difference between the opposing accounts has been adjusted and settled: *Catlin v. Knott*, 2 Or. 321, approved and followed.
3. **IDEM.**—Accounts purchased from third parties are not mutual accounts so as to prevent the running of interest upon them, under Hill's Code, § 3587, providing for interest on accounts from the day the balance is ascertained.
4. **TRIAL—FINDINGS OF FACT.**—When a cause is tried by the court without the intervention of a jury, there should be findings of fact upon all the material issues presented by the pleadings. *Drainage District v. Cross*, 20 Or. 535, cited and approved.
5. **CONTRACT—ACT OF GOD.**—Failure to repair leased dams or races within

* **NOTE.**—The effect on contract rights of an intervening impossibility of performance is treated in an exhaustive note to *Stewart v. Stone* (N. Y.), 14 L. R. A. 215. Later cases on the same subject are *Anderson v. May* (Minn.), 17 L. R. A. 555, and *Remy v. Olds* (Cal.), 21 L. R. A. 645, while the kindred question of the right to recover on a contract for services interrupted by sickness or death is annotated with the case of *Parker v. Macomber* (R. I.), 16 L. R. A. 858.—REPORTER.

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ten days after the water has fallen to the average winter stage as required by a contract leasing the water power, is not excused, if the water continues below that stage, by the fact that the work could not profitably be done within the time agreed upon; but if the water falls below the required stage and immediately rises again and continues above the required depth, the lessor will be released from liability for breach of his covenant, if he makes the repairs as soon as possible.

6. ACT OF GOD—DEFENSE—PLEADING.—The act of God rendering performance impossible, if relied on as a defense, must be pleaded.
7. CONTRACTS—LIQUIDATED DAMAGES.—A clause in a lease for a *pro rata* reduction of the agreed rent of a water power in case of a deficiency of water, is not a provision for liquidated damages so as to prevent the lessee from recovering damages for breach by the lessor of another clause in the same lease to repair the dams and races, whereby the lessee loses the use of his mill, the rental value of which is twenty dollars per day, while the rent of the water power is only three dollars per day.

Lane County: J. COREY FULLERTON, Judge.

This is an action by B. J. Pengra to recover from Almon Wheeler the rent of, and damages for an injury to, a water power. The facts are that the plaintiff, on the thirteenth of February, 1888, was the owner of a water power, consisting of a flume, dam, and gates, which conducted water from the middle fork of the Willamette River to Springfield, Lane County, and the defendant was the owner of a saw and planing-mill at that place, which was operated by water power; and at said date the plaintiff, in consideration of one thousand dollars per year, payable quarterly, leased said water power to the defendant for the term of ninety-nine years. The contract of lease, among other things, contained the following provisions: "In case said dams and races are injured by high water, or obstructed by drift of timber, or gravel, or other substance, the lessor herein shall repair the same, or remove the obstructions within ten days after the river shall have fallen to an average winter stage, and in default of a sufficient supply of water from any cause, shall forfeit a *pro rata* portion of the water rents accruing thereunder during the time such deficiency

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may exist; and if the lessor or his assigns does not enter upon the work of repairing within fifteen days after the water has subsided to an ordinary winter stage, this lessee or his assigns may themselves make the necessary repairs, and collect the costs thereof from the owner of the water power, the same being an offset against any accrued or accruing water rents. The owner of the water power shall at all times when logging is in progress keep a sufficient depth of water in all parts of the race to make it practicable to move logs through the same when handled in a skilled and workmanlike manner, of the size commonly run; and in default thereof shall pay such damages as the mill owners may sustain for want thereof." An unusual freshet in the Willamette River on the third of February, 1890, carried out the dam and injured the race, and plaintiff, on the twenty-fourth of said month, and as soon as the water had receded, commenced to repair the injury, but was unable to complete the work until the third of May. On the second of June, 1890, plaintiff assigned all his right, title, and interest in said lease to the Springfield Power & Investment Company, a private corporation, and on the sixth of June, 1891, said corporation reassigned said title and interest, together with all claims for rent or damage, to the plaintiff.

Plaintiff's cause of action for rent is, (1) one thousand dollars from the second of June, 1890, to the sixth of June, 1891; (2) eight hundred and five dollars from the thirteenth of August, 1889, to the second of June, 1890; and (3) seven hundred and fifty dollars from the sixth of June, 1891, to the thirteenth of February, 1892, and interest on each of said sums. The complaint contains eleven other causes of action, but as the court found against the plaintiff on each, it is not necessary to mention them. The defendant admitted that there was due on the first cause of action three hundred and thirteen dollars and thirteen cents, which had on the thirteenth of June, 1891, been stated and

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agreed upon between him and the Springfield Investment & Power Company; on the second, five hundred and fifty-one dollars and thirty cents; and, on the third, six hundred and twenty-eight dollars and twenty-three cents. The defendant, by way of counterclaim, alleged eight separate defenses, of which the sixth only requires consideration here. In this it is alleged that plaintiff failed, neglected, and refused to repair the dam and race within ten days after the water had fallen to an average winter stage, and that thereby defendant had lost the use of his mills for sixty-four days to his damage in the sum of nine hundred and sixty dollars. The reply denied the allegations of new matter in the answer, and the cause being at issue was tried by the court, which found the amount of rent due as admitted by the defendant, and allowed plaintiff interest on said sums from the time they became due, and also allowed defendant's counterclaims and interest thereon from the time the several accounts accrued, and gave judgment in favor of plaintiff for the balance, but refused to allow defendant's claim for damages, from which he appeals. Reversed.

Lawrence Flinn, and *H. H. Hewett* (*A. E. Gallagher* on the brief), for Appellant.

Geo. H. Williams (*C. E. S. Wood* on the brief), for Respondent.

MR. JUSTICE MOORE delivered the opinion of the court:

1. The defendant contends that the court erred in allowing plaintiff interest on the installments of rent. In *Hawley v. Dawson*, 16 Or. 344 (18 Pac. Rep. 592), it was held that when the amount of recovery is unliquidated, and there is no express agreement to pay interest, default in the payment does not occur till the amount which the party ought to pay is fixed and made certain. In the

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case at bar, while the contract provided that the rent should be one thousand dollars per year, payable quarterly, it also provided that in default of a sufficient supply of water from any cause a *pro rata* portion of the accruing water rents should be forfeited. This provision would render the amount of rent due under the contract dependent upon the supply of water for each quarter, and hence the amount of rent, in case of an insufficient supply, would be unliquidated; and since the contract made no provision for the payment of interest, it could not be recovered until the amount of rent which the defendant ought to have paid had been fixed and made certain. Section 3587, Hill's Code, provides that "The rate of interest in this state shall be eight per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained," etc. The contract having provided that the rent should be paid quarterly, under this section interest must be allowed from the end of each quarter on deferred payments, except in case of an offset, in which case interest can be recovered only from the time that the balance due can be made certain.

2. The record shows that the defendant sold and delivered goods to the plaintiff, paid out money for his use and benefit, and made repairs on the leased premises. Would this make the account mutual between them? Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an agreement, express or implied, for a set-off of mutual debts: *Angel, Limitations*, §149. "Accounts are mutual when each party makes charges against the other in his books, for property sold, services rendered, or

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money advanced”: *Edmonstone v. Thompson*, 15 Wend. 554. “The mode of settling mutual accounts involves the examination of the same by the parties, and the arrival at an understanding of the amount remaining due from the one party to the other as an adjustment thereof. It becomes a settlement, and in such cases only is interest allowed to run”: *Catlin v. Knott*, 2 Or. 321. The rent on one side of the account, while payable in money, did not destroy the mutuality when set-offs were made on the other: *Catling v. Skoulding*, 6 Term. R. 189. There was no account due the plaintiff, so as to draw interest under the statute, until the balance was ascertained (*Waterman, Set-off*, § 19), and the allowance of interest to either party was error.

3. The record further shows that upon an accounting with the Springfield Investment Company on the thirteenth of June, 1891, there was found to be due from the defendant to said company the sum of three hundred and thirteen dollars and thirteen cents on account of rent, which account was assigned to plaintiff, and that one A. E. Gallagher, having an account against plaintiff amounting to one hundred and fifty dollars and forty-five cents, assigned the same to defendant. These accounts did not arise between the plaintiff and defendant and were not therefore mutual; and since the assignors could have recovered interest thereon from the time they became due, the court properly allowed interest on each.

4. The defendant contends that the court erred in not considering his claim for the loss occasioned through plaintiff's failure to repair the dam and race within ten days from the time the water had fallen to an average winter stage, the findings of the court not covering the issues upon that question. It is alleged in the answer that the water receded to an ordinary winter stage on or about the fifteenth of February, and that from said date to and including the twenty-fifth of said month, and for some time thereafter, the water was continuously at or below said

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stage; and that from the twenty-fifth of February to the third of May the water was at or below the ordinary stage nearly all the time. These allegations were specifically denied in the reply, but there was no allegation therein that plaintiff had been prevented by an act of God from completing the repairs within the agreed time. Upon this issue the court found that the water did not recede to an average winter stage on or about the fifteenth of February; that the plaintiff, as soon as it had receded, commenced to repair the injury and thereafter worked diligently until it was completed; and that defendant was not injured through any fault or negligence of the plaintiff in failing to repair; and by an amended finding states that "It is difficult to determine from the evidence in this case when the water did recede to an ordinary winter stage after the third day of February, 1890. The evidence does not show that said river receded to an average winter stage and remain at or below that stage for ten consecutive days before the third day of May, 1890." These findings impliedly admit that the water receded to the proper stage at some time prior to the third of May, but do not appear to have been based upon any issue made by the pleadings. It would appear from such findings that, in consequence of a rise in the river after the water had fallen to the required stage, plaintiff had been precluded from making the repairs. The material issue was whether from the fifteenth to the twenty-fifth day of February, 1890, and for some time thereafter, the water was continuously down to or below an average and ordinary winter stage. The findings are silent as to the time the water receded, and it does not appear therefrom whether or not the water was continuously or at all down to an ordinary winter stage between said dates. The law is well settled in this state that when a cause is tried by the court without the intervention of a jury there must be findings of fact upon all the material issues presented by the pleadings: *Drainage*

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District v. Crow, 20 Or. 535 (26 Pac. Rep. 845). There being no finding upon this issue, it must be presumed that it escaped the attention of the court. If the repairs were made within ten days after the water had fallen to the required stage defendant has no cause of action on his claim for damages; or, if the finding was to that effect, and there was any evidence to support it, this court would not review such finding.

5. Admitting that a sudden rise of the river after it had fallen to the proper stage had prevented the plaintiff from making the repairs within the given time, and this fact were an issue in the cause, is the plaintiff liable for a breach of the conditions of his covenant caused by the act of God? It is a well recognized principle of law that when it is apparent that the parties have contracted on the basis of the continued existence of a given thing, then, on performance becoming due, if, without the fault of the parties, the thing has ceased to exist, the case has become one of mutual mistake, and the duty to perform no longer remains: Bishop, Contracts, § 588; Chitty, Contracts, § 1070. The contract in the case at bar relates to the lease of the water power. The injury to the dams and race was not a destruction of the power which continued to exist after the flood. The dams and race were incidents of the power and were to control it, but they did not constitute the power, and hence their destruction or injury did not affect the continued existence of the power. If the stream had, in consequence of drought, failed to furnish the necessary amount of water to operate defendant's mills, this would have been a destruction of the subject matter of the contract which would have excused performance. The theory that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, had its origin in the *dictum* of the court in *Paradine v. Jane*,

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Aleyn 26, and this rule is not infrequently applied where the impediment comes from the act of God. But the actual adjudications, while discordant, come far short of this; so that, as a whole, this *dictum* is not sustained by them: Bishop, Contracts, § 590. "It is," says Mr. Justice SWAYNE, "a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him": *Dermott v. Jones*, 2 Wall. 1. The act of God will dispense with the performance of a contract, but to bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible: *Beebe v. Johnson*, 19 Wend. 500 (32 Am. Dec. 578). The plaintiff having agreed to make the repairs within ten days from the time the water had fallen to an average winter stage, cannot justify the failure to comply with this requirement if the water continued at or below that stage, by saying that the work could not profitably have been done within the agreed time, since by the employment of more labor the repairs might have been completed within the time. This would have been within the power of the plaintiff, and, therefore, not impossible; but if, after the water had fallen to the required stage it immediately rose and continued high for some time, this would have been such a dispensation as would have rendered the performance of the contract impossible. If one engages to make repairs before a particular day, and it becomes impossible by the act of God to make them by that day, he will not be liable for a breach of the covenant, if he repairs as soon as possible thereafter: *Taylor, Landlord and Tenant*, § 361.

6. If the plaintiff had intended to rely upon the act of God as a dispensation, he should have alleged this fact

and made it an issue (Bailey on Onus Probandi, 296), but this he may be able to do in another trial by amendment if he so desire.

7. The plaintiff contends that the parties have stipulated for the amount of damages, and hence they are bound thereby. The contract provides that in default of a sufficient supply of water from any cause, the lessor shall forfeit a *pro rata* portion of the water rents accruing thereunder during the time such deficiency exists. "Whenever," says Mr. Sedgwick, "the damages were evidently the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, it will be allowed by the court as liquidated damages": Sedgwick, Damages (8th Ed.), § 405. The contract provides that plaintiff shall furnish a given quantity of power for a certain sum of money, and stipulates that in default thereof from any cause, the defendant shall only pay for what he obtained. Can it be said from this that the damages had been the subject of calculation and adjustment between the parties? That the parties did not anticipate such an unusual freshet in the river when the contract was executed is inferable from the fact that plaintiff agreed to make the repairs within the given time, and this fact alone would seem to rebut the theory that the damages had been the subject of calculation and adjustment in advance of the injury, or that the sum named had been agreed upon and intended as compensation. The evidence shows that the rental value of defendant's mill was from twenty dollars to twenty-five dollars per day, and that without the use of the water power it was valueless, while the rent of the water power was only three dollars per day by the terms of the contract. In *Fisher v. Barrett*, 4 Cush. 381, the defendants had leased to the plaintiff a part of their mill, and covenanted to make additions to the machinery, and furnish steam power to

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operate the same. It was further agreed that in default of a supply of steam power, the rent should be suspended. Defendants' neglected to make the additions, and refused to furnish the power. In an action for damages the defendants plead that the suspension of the rent was intended to be liquidated damages for the breach of the covenant, and that they were not liable for any other damages. The court held that the damages had not been liquidated. In that case the plaintiff's damages were the result of the defendants' refusal to furnish the motive power. The damages could not have been less had they arisen from inevitable accident. The injury to plaintiff's business was the measure of his damage, and not the motive with which the defendants refused to furnish the power. This was equivalent to holding that a suspension of the rent was not a reasonable compensation for the damages sustained. It would appear from this that the forfeiture of the rent in the case at bar was not a reasonable compensation for the loss of the use of the mills.

The judgment of the court below is reversed and a new trial ordered. REVERSED.

[Argued July 25, 1893; decided October 23, 1893.]

IN RE CLAYSON'S WILL.

[S. C. 34 Pac. Rep. 353.]

REQUISITES FOR PROBATING A FOREIGN WILL—CODE §§ 731, 3082.—To render a foreign will effective to convey real estate in Oregon under the law as it existed prior to 1891, it must not only have been executed in the manner prescribed by the law of this state, but must also have been proved in the foreign jurisdiction in the manner required by the Oregon law (Hill's Code, § 3082); and this entire record must have been authenticated in the manner provided by section 731, Hill's Code.

Clackamas County: FRANK J. TAYLOR, Judge.

Opinion of the court— LORD, C. J.

This is a proceeding brought by Emma Jane Clayson, in the county court of Clackamas County, to have the will of W. H. Clayson, a non-resident decedent, admitted to probate, and to have ancillary letters of administration with the will annexed issued thereon to some suitable person, and to have the defendant Charles Clayson, administrator of the estate of such decedent, removed, and comes here on an appeal by Charles Clayson. *Reversed.*

Algernon Sidney Dresser, and Edw. Mendenhall, for Appellant.

Joseph Simon (Cyrus A. Dolph, and Rufus Mallory on the brief), for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

A brief statement of the facts is essential to the determination of the question involved. It appears from the transcript that W. H. Clayson, who was an inhabitant and resident of England, died in that country on the sixth day of October, 1890, leaving an estate therein, and also leaving an estate consisting of real property in Clackamas County, Oregon; that the deceased left a will dated the fifth of September, 1889, with a codicil thereto dated the seventh of October, 1889; that said will and codicil was duly probated, proved, and registered in the Principal Probate Registry of Her Majesty's High Court of Justice in England, and letters testamentary were duly granted thereon to Emma Jane Clayson, one of the trustees, and the executrix therein named, who, on the thirteenth day of January, 1891, was duly qualified and sworn to execute the said will, and is still acting in England as such trustee and executrix; that on the eleventh day of March, 1891, Charles Clayson, the appellant, of Portland, Oregon, filed a petition in the county court of Clackamas County

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in which he represented *inter alia* that the said W. H. Clayson died intestate, leaving an estate in said county, and praying for the appointment of himself as administrator of said estate; that he was thereupon duly appointed, and on the thirty-first day of March, 1891, qualified as such administrator; that on the fourth day of September, 1891, Emma Jane Clayson, through her attorneys, filed in the said county court her petition for the probate of the will of W. H. Clayson, deceased, and the appointment of some suitable person as administrator with the will annexed, and for an order removing Charles Clayson as administrator, and revoking his letters of administration. Filed with her petition, and forming a part thereof, is a paper alleged to be a duly authenticated copy of said will and codicil with the probate thereof. There are other facts connected with these proceedings, but their statement is not deemed material to our inquiry. The transcript also shows that the appellant filed an answer in which he denied, either absolutely or upon information and belief, substantially all the allegations of the petition, and alleged some new matter which was denied in the reply. When the petition came on for hearing the petitioner offered in evidence an instrument purporting to be a certified copy of the last will of W. H. Clayson, deceased, with the probate thereof in the Principal Probate Registry of Her Majesty's High Court of Justice in England, which the court refused to receive, holding, as indicated by its order, that such instrument was not authenticated as required by law, and was not entitled to probate or record in this state, and thereupon dismissed the proceeding. From this order an appeal was taken to the circuit court, which reversed the order of the county court, and remanded the case for further proceedings therein. From the decree reversing said order this appeal was taken.

The question to be determined is, whether, upon the facts herein disclosed, the instrument offered in evidence

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as a certified copy of the last will and testament of W. H. Clayson, deceased, is entitled to be admitted to probate or record in this state. The principle is elementary that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which the title to it can pass from one person to another. "The validity of every disposition of real estate," says Sir WILLIAM GRANT, "must depend upon the law of the country in which that estate is situated": *Curtis v. Hutton*, 14 Vesey, Jr. 537; *McCormick v. Sullivan*, 10 Wheat. 201; Story, Conflict of Laws, § 424. Real property may be conveyed by a will or by deed, but in either case, to have that effect it must be executed according to the laws of the country where the property is located. Real property is never for an instant without an owner. When a person dies leaving real property, the title to it vests *eo instanti* in his heirs unless he has made a will conformable to the law of its *situs*, making a different disposition of it from that which the law would otherwise make.

At the time of the testator's death, and also at the date of his alleged will, section 3082, Hill's Code, required a foreign will devising real estate located in Oregon, to be executed and proved according to its laws. Said section provides that "any person not an inhabitant, but owning property, real or personal, in this state, may devise or bequeath such property by last will, executed and proved according to the laws of this state, or of the state, country, or territory in which the will shall be proved." If a person not an inhabitant, but owning real property in this state, died in a foreign country and left a will devising such property, and the will was admitted to probate in that country, its execution and the proof thereof would have to be sufficient if made in this state to convey real property therein, before the heirs will be devised of their title to it. The probate of a will in one state does not

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establish its validity as a will devising real property in another state unless the laws of the latter state permit it. It is essential, therefore, in order that a foreign will be effective to convey real estate situated in Oregon, that it not only be executed in the manner prescribed by the law of the state, but also that it be proved in the foreign jurisdiction in the manner required by such law. When a foreign will has been executed and proved in the foreign court according to the laws of this state, the next step required to be taken in order to give it effect is to present a copy of it, and the probate thereof, duly authenticated, to the county court in which the land lies, so as to entitle it to be admitted to record. Section 3083 provides: "Copies of such will, and the probate thereof, shall be recorded in the same manner as wills executed and proven in this state, and shall be admitted in evidence in the same manner and with like effect": Woerner, Administration, § 493. In the light of section 3082 the words "the probate thereof" include the proof of the will before the foreign tribunal and its order admitting it to probate. There must be a copy of the will and a copy of the evidence upon which such order was made, showing that in the execution and proof of the will the requirements of the law of this state have been complied with; but before copies of such will and the probate thereof in the foreign jurisdiction can be admitted in evidence, they must be duly authenticated. There is nothing in section 3083 to indicate the manner in which these copies are to be authenticated, nor is it necessary that there should be. A will admitted to probate is a judicial record, and section 731 provides how a judicial record of a foreign country must be proved. It is clear, then, under the sections we have been considering (3082, 3083, and 731), that before a foreign will can be admitted to record it must be shown by authenticated copies of the will and of the evidence upon which the foreign probate was granted, that the will was

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executed and proved according to the laws of this state. Mr. Woerner says: "In many states (among which he includes Oregon) it is affirmatively provided that the foreign probate is conclusive only in so far as the will concerns personal property; to pass title to real estate it must appear, either by proof furnished in the form *loci rei sitæ*, or by the authenticated copy of the evidence upon which the foreign probate was granted, that in the execution, attestation, and proof of the will, the requirements of the law of the state in which the land lies have been complied with." And again, unless the foreign probate is made conclusive as to real property by the statute, he says "it must affirmatively appear from such foreign probate, or other proof, that the law of the forum has been observed in making and proving the will in order to give validity to its deposition of real estate." The validity of the will must be determined by the laws of the state in which the property is situated unless such laws make the foreign probate conclusive: *Robertson v. Pickrell*, 109 U. S. 610 (3 Sup. Ct. Rep. 407).

As the facts disclose that the death of W. H. Clayson, and also the probate of his will in the foreign jurisdiction, occurred while the statutes cited were in force, it results, if such will is to have the effect to convey real estate in Oregon, that it must be shown to the satisfaction of the county court, either by proof furnished to it or by certified copies of the will and the probate thereof, showing that in the execution, attestation, and proof of the will the requirements of the law of this state were observed, and that the record of such probate—it being a judicial record—be duly authenticated as required by section 731. The paper offered in evidence, purporting to be the last will of W. H. Clayson, does not meet these requirements. The proof upon which the foreign probate was granted is not disclosed so as to show to the court that the alleged will was executed and proved according to the laws of Oregon, nor

 Points decided.

is the record of the foreign probate authenticated so as to show that the court or officer whose judicial act or proceeding is certified had jurisdiction to probate the same, etc., as prescribed by said section 731. In fact, the will and codicil of W. H. Clayson and the foreign probate thereof presented to the county court were prepared and certified under the amendments of the twentieth of February, 1891, to sections 3082 and 3083 (Laws, 1891, p. 99), but as those amendments were not in existence when Clayson died and his will was admitted to probate in England, and as there is nothing retroactive in such amendments, they can have no application to the present case, as in the absence of express words to that effect a law can only operate upon future and not upon past transactions.

From these considerations it follows that there was no error in refusing to admit such alleged will to probate and record; and that the decree of the circuit court be reversed and the cause remanded for such further proceedings as may be deemed proper and not inconsistent with this opinion. **REVERSED.**

24	548
26	76
28	496

 [Argued July 26, 1893; decided October 23, 1893.]

LEINENWEBER v. BROWN.

[S. C. 34 Pac. Rep. 475.]

1. **EXECUTION SALE—OBJECTIONS TO CONFIRMATION—EQUITY.**—An execution debtor who has failed to appear in the original suit and move to quash the execution, or to file objections to the confirmation of the sale, without any other excuse for such failure than absence from the state, is precluded from bringing a suit to set aside such sale on the ground of inadequate price and irregularities subsequent to the decree.
2. **EXECUTION SALE—IRREGULARITIES—CONFIRMATION.**—An order confirming an execution sale of real property is a conclusive determination of the regularity of the proceedings under the execution. *Matthews v. Eddy*, 4 Or. 225; *Dolph v. Barney*, 5 Or. 191; *Wright v. Young*, 6 Or. 87; and *McRea v. Daviner*, 8 Or. 63, cited and approved.

Clatsop County: THOS. A. McBRIDE, Judge.

Statement of the case.

This is a suit in equity by Mary H. Leinenweber and F. J. Goodenough against Hiram Brown and H. A. Smith, sheriff of Clatsop County, to set aside a sale of real property made under an execution issued on a decree of foreclosure, and comes here on appeal from a decree of the court below sustaining a demurrer to the complaint and dismissing the suit. The material allegations of the complaint are that on the second of March, 1885, the plaintiff, Mary H. Leinenweber, being the owner of all the Powers donation land claim in Clatsop County (except one hundred and thirty-five acres theretofore sold to John Adair), mortgaged the same to the board of school land commissioners to secure the payment of the sum of two thousand five hundred dollars with interest; and afterwards, on the twenty-eighth day of January, 1890, sold and conveyed forty-seven and twenty-seven hundredths acres thereof, subject to the mortgage, to Trueman H. Leinenweber and F. J. Goodenough, and that Goodenough subsequently purchased Leinenweber's interest in the same; that on the fifteenth of July, 1890, she made, executed, and delivered to Allen & Lewis a second mortgage upon the land then owned by her to secure the payment of the sum of twenty thousand six hundred and fifty-one dollars and twenty-five cents, which was assigned and transferred by Allen & Lewis to the defendant Hiram Brown, who in the year 1891 began a suit in the circuit court for Clatsop County to foreclose it, making the plaintiff Leinenweber and the board of school land commissioners parties, but not the plaintiff Goodenough. It further appears that in said suit the board of school land commissioners appeared and answered, asking for a decree foreclosing its mortgage, and such proceedings were afterwards had as that both the mortgage in favor of the school fund and the mortgage in favor of Allen & Lewis, then owned by Brown, were foreclosed, and the property ordered sold to satisfy the same; that on the first day of February, 1892, Brown caused an

Statement of the case.

execution to issue on the decree in which both said tracts of land were described as one, and as if owned by the plaintiff Leinenweber alone, and covered by and included in both mortgages, the execution requiring the sheriff to levy upon and sell all the right, title, and interest of the plaintiff Mary H. Leinenweber in and to the donation land claim of Powers and wife, except the one hundred and thirty-five acres sold to Adair; that the execution was not issued upon the joint request of Brown and the board, nor pursuant to an order of court or the judge thereof, but was issued solely upon the request of Brown; nor did it require the sheriff to apply the proceeds derived from the sale of the property to the satisfaction of said mortgages, or either of them, but merely required him to apply the proceeds of the sale to the costs and expenses of making the same, and of and upon the execution. Moreover, it is alleged that after the execution was placed in the hands of the sheriff for service, he published a notice of the time and place of sale, and in the notice claimed and represented that by the terms of the execution he was authorized to sell all the property described in the school fund mortgage to satisfy a decree for the sum of three thousand and thirty-two dollars in favor of the board, and a decree for the sum of twenty-three thousand two hundred and eighty-five dollars and eighty-one cents in favor of Brown, while in truth the execution did not authorize him to sell the land or any part thereof to satisfy the said decrees, or either of them; and that the execution varied from the decree in that it failed to direct an application of the proceeds of the sale in the manner provided in the decree, and that the notice misrepresented the requirements of the execution and the object of the sale.

The complaint further shows that the real estate is agricultural land, and that it is customary to sell land of this character in said county upon Saturdays when agriculturists are in the city of Astoria, which is the county

Statement of the case.

seat of said county and the only city therein; that said property was sold upon a day when but few agriculturists are customarily in the city, and it also appears that the only newspaper in which the notice of sale was published was the Daily Town Talk, which was not a newspaper of general circulation in said county; but, on the contrary, was a newspaper the circulation of which was limited to but a small portion thereof, to wit, the city of Astoria; that upon the second of March, 1892, the sheriff proceeded to sell, and did sell, upon the said pretended execution, all the interest of the plaintiff Leinenweber in the property described in the execution, to the defendant Brown for the sum of fifteen thousand dollars, he being the highest and best bidder therefor, such sale being made *en masse* and not in separate parcels; that as a result of the proceedings above described, the defective execution, the unauthorized terms of the notice, and the manner of its publication, not more than twelve persons were present when the sale was made to the defendant Brown for the said sum of fifteen thousand dollars, although the property was reasonably worth the sum of seventy thousand dollars; that the sale was confirmed by order of the court on the eleventh of March, 1892; but during all the times when the notices were being published, and when the sale was made and confirmed, the plaintiff Leinenweber was without the state of Oregon, and was within the state of California, and did not discover that the sale had been made until after the confirmation thereof, and that said Goodenough was not made a party to said foreclosure suit. It is also alleged that defendant Brown had knowledge of all the acts and proceedings mentioned and participated in the same at the respective times thereof, with the purpose of obtaining said real estate at an inadequate and unfair price, and preventing a redemption of the same or any part thereof. Affirmed.

J. Henry Smith, for Appellants.

Joseph Simon, for Respondents.

MR. JUSTICE BEAN delivered the opinion of the court:

1. It is manifest the complaint does not state facts sufficient to constitute a cause of suit, and the demurrer was properly sustained. It is sought by this suit to set aside an execution sale of real property, on the ground of inadequate price and irregularities in the proceedings subsequent to the decree upon which the sale was made. The allegation that the defendant Brown had knowledge of and participated in the proceedings with the purpose of obtaining the land at an inadequate and unfair price, is too vague and uncertain to charge fraud; and, besides, the complaint does not show that the plaintiff Leinenweber could not have prevented the sale by a motion in the court below to quash the execution, or by objections to the confirmation of sale, and having failed to press her objections at the proper time, or to show that she was prevented from so doing by fraud or deception, she is not entitled to relief by an independent suit: Black, Judgments, § 370. The plaintiff had a right to and could have appeared in the original suit and moved to quash the execution, or filed objections to the confirmation of the sale for the reasons stated and alleged in the complaint, all which, so far as appears, she failed and neglected to do; nor does she offer any excuse for such failure except her absence from the state, and that certainly does not present sufficient ground for relief in this suit.

2. The defects, if any, in the execution under which the sale was made, were but mere irregularities which did not render it void, and should have been taken advantage of by a motion to quash, and the law has long been settled in this state that an order or decree of confirmation of an execution sale must be regarded as a conclusive determination of all questions concerning the irregularity

Points decided.

of the proceedings subsequent to the execution: *Matthews v. Eddy*, 4 Or. 225; *Dolph v. Barney*, 5 Or. 191; *Wright v. Young*, 6 Or. 87; *McRea v. Daviner*, 8 Or. 63. **AFFIRMED.**

ON REHEARING.

[November 13, 1893.]

Since the opinion was filed in this case, but before the entry of a decree, our attention has been called to the fact, by the petition of the plaintiffs, that the court below not only sustained a demurrer to and dismissed the amended complaint, but it further adjudged and decreed that "the defendant Hiram Brown is the owner in fee simple of all the land set forth and described in the amended complaint of the plaintiff herein." This was clearly an error. The case was disposed of both by the court below and in this court upon the ground that the complaint did not state facts sufficient to constitute a cause of suit, and was therefore dismissed, and the only decree that should have been entered was a decree to that effect. It follows, therefore, that in entering a decree in this case the determination of the lower court will be affirmed, except as to the clause above quoted, and a decree entered here dismissing the complaint. **AFFIRMED.**

[Argued October 4, 1893; decided October 30, 1893.]

SHERMAN v. BELLOWS.

[S. C. 34 Pac. Rep. 549.]

INJUNCTION—SUIT BY PRIVATE CITIZEN*—TAXATION.—A private individual cannot bring an action in his own name to enjoin the location of a public institution at a different place from that designated by law, without alleging that his property will thereby be subjected to an additional burden of taxation, or that he will sustain some other special injury.

*NOTE.—This subject is discussed at length with a careful comparison of authorities in a note to the case of *McCord v. Pike*, 2 Am. St. Rep. 85 (121 Ill. 228; 12 N. E. Rep. 259).—REPORTER.

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26	509
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28	508
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32	383
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37	468

Statement of the case.

Linn County: GEO. H. BURNETT, Judge.

This is a suit brought by D. C. Sherman in his own name against A. J. Bellows, James Byron, J. W. Mullen, Charles Nickell, and S. S. Train, the trustees of the Oregon Soldiers' Home, to restrain them from purchasing land for a site and locating the Soldiers' Home at Roseburg. The material allegations of the complaint, in substance, are that plaintiff is a citizen, resident, and taxpayer of the state of Oregon; that the defendants are the duly appointed, qualified and acting trustees of the Oregon Soldiers' Home, and by virtue of their office are charged with the duty of selecting and locating the site of said Oregon Soldiers' Home, and of erecting suitable buildings thereon; that said Oregon Soldiers' Home is a public institution, established and provided for by the legislative assembly of the state of Oregon; that section 3 of article XIV. of the state constitution provides that all such institutions shall be located at the seat of government; that in the contest for the location of such seat of government at the general election in 1864, Salem, in Marion County, Oregon, received a majority of all the votes cast, and was thereupon duly declared the permanent seat of government; that plaintiff has been informed and believes that said defendants, disregarding their obligations as trustees of said Oregon Soldiers' Home have entered into a contract to purchase a tract of land at or near Roseburg, Oregon, with the intention of using the same as the site of said Oregon Soldiers' Home; that, as plaintiff is informed and believes, said defendants have had prepared a plan and specifications for the necessary buildings, and are about to let a contract for the erection of the same at great cost and expense to the state of Oregon, without authority of law; that by their said action in contracting to purchase said tract of land at or near Roseburg, Oregon, as the site of the said Oregon Soldiers' Home, the erection of public buildings thereon

Opinion of the court—MOORE, J.

and expenditure of large sums of public money therefor, great injury will be done to the public and to this plaintiff; and that plaintiff has no plain, adequate, or speedy remedy at law, wherefore he prayed a preliminary injunction, and that at the hearing it be made perpetual. To this complaint the defendants interposed a demurrer, for the reasons: *First*, that the plaintiff has not the legal capacity to bring this suit; and, *second*, that the complaint does not state facts sufficient to constitute a cause of suit against the defendants. The demurrer was overruled, and, defendants refusing to further plead, a permanent injunction was granted, from which the defendants appeal. Reversed.

Geo. E. Chamberlain, attorney-general, for Appellants.

H. J. Bigger, and *Loring K. Adams* (*A. O. Condit* on the brief), for Respondents.

MR. JUSTICE MOORE delivered the opinion of the court:

Two questions are here presented: *First*, has the plaintiff any legal capacity to sue; and, *second*, does the complaint state facts sufficient to constitute a cause of suit? While there is an irreconcilable conflict in the decisions upon the right of a taxpayer, in his own name, to restrain by injunction, a municipal corporation and its officers from illegally creating debts, or disposing of the corporate property, or funds, we think the decided weight of authority supports the doctrine that he may invoke the aid of a court of equity to obtain such relief whenever it is made to appear that such illegal act of the corporation would increase his burden of taxation: *Hodgman v. Chicago & St. Paul Ry. Co.* 20 Minn. 48; *Willard v. Comstock*, 58 Wis. 565 (46 Am. Rep. 657; 17 N. W. 401); *New Orleans R. R. Co. v. Dann*, 51 Ala. 134; *Springfield v. Edwards*, 84 Ill. 627. When a plain official duty is threatened to be violated

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by some official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it: *Board of Liquidation v. McComb*, 92 U. S. 531. Conceding, without deciding, that the Soldiers' Home is a public institution of the state, provided by the legislative assembly, and that section 3 of article XIV. of the constitution required the trustees to locate it at Salem; that they had threatened to violate their official duty by locating it at Roseburg,—does it appear that plaintiff has sustained a personal injury thereby? If it were alleged that, in consequence of the location of the Soldiers' Home at Roseburg, plaintiff's property would be subjected to a burden of taxation in addition to that which it would be required to bear if located at Salem, then he would sustain a personal injury, and, since an adequate compensation cannot be had at law, he would be entitled to an injunction to prevent such location. "The damages," says Judge DILLON, "which he will sustain in case his burdens of taxation are increased, are not in common with the damages to other taxpayers, but they are special, affecting his private property and private rights": *Dillon, Municipal Corporations*, § 731, and cases cited.

A municipal corporation holds its property and funds in trust for the benefit of taxpayers, and whenever it attempts to allow an illegal claim, consent to a collusive judgment, misappropriate the public money, or do any other act *ultra vires*, the taxpayer, in his own name, may have an injunction to restrain such unlawful acts, when his property would thereby be compelled to bear its *pro rata* share of the burden thus imposed: *Willard v. Comstock*, 58 Wis. 565 (17 N. W. Rep. 401; 46 Am. St. Rep. 657). His right to invoke the aid of a court of equity to restrain by injunction such unlawful acts depends upon his personal injury, and the test of such injury is measured by the fact that his property would be subjected to

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an additional burden of taxation. If his property will not be subjected to an additional burden of taxation, and he will not sustain any other personal damages, his injury is not contra-distinguished from that of all other taxpayers of the municipality, and he cannot invoke the aid of equity to prevent an unlawful corporate act, however much he may, in common with others, be injured: *Seager v. Kankakee County*, 102 Ill. 669. His special injury is the gist of the suit and unless it is alleged and proved, there can be no equitable relief in such cases: *McDonald v. English*, 85 Ill. 236. In no case has it ever been held that a private individual may maintain a bill to enjoin a breach of public trust (in the absence of statutory authority) without showing that he will be specially injured thereby: *Angel, Highways*, § 284.

The plaintiff does not allege that in consequence of the location of the Soldiers' Home at Roseburg his property will be subjected to any burden of taxation, or that he will sustain any other special injury. These allegations were necessary to give the court jurisdiction to entertain his suit and grant the injunction, and, in their absence from the complaint, the plaintiff shows no legal capacity to sue, and, besides, the facts therein stated are not sufficient to constitute a cause of suit. For these reasons the decree of the court below is reversed, the demurrer sustained and the cause remanded for such other proceedings as may be deemed necessary, not inconsistent with this opinion. REVERSED.

Opinion of the court—Lord, C. J.

[Argued October 16, 1893; decided November 8, 1893.]

WARREN v. CROSBY, MAYOR.

[S. C. 34 Pac. Rep. 661.]

CONSTITUTIONAL LAW—AMENDMENT OF STATUTES BY REFERENCE TO TITLE—
REPEAL BY IMPLICATION—CONSTITUTION, ARTICLE IV. § 22.—Statutes, not amendatory or revisory in character, but original in form and complete within themselves, exhibiting on their face their purpose and scope, are not within the constitutional prohibition against amending acts by reference to their title (Or. Const. article IV. § 22), notwithstanding they may by implication amend or modify existing laws upon the same subject. *State v. Wright*, 14 Or. 370, overruled.

IDEM—LAWS, 1893, P. 116.—The act of 1893, p. 116, which provides for the collection of taxes, and section 9 of which transfers to county officers the exclusive power to assess and collect taxes for school districts and incorporated towns and cities, is not unconstitutional because it amends city charters and school district acts without setting them out at length. As it amends the other acts only by implication, it is not within the constitutional requirement that amended acts must be set out as amended.

Clatsop County: THOS. A. McBRIDE, Judge.

Action by M. S. Warren against M. C. Crosby, mayor of the city of Astoria, Oregon, and others, to enjoin such city from incurring further expense in assessing and collecting the city taxes for the year 1893. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. F. Hamilton, for Appellants.

George Noland, for Respondent.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

This is a suit brought by a taxpayer of the city of Astoria to enjoin the city from incurring any further expense in assessing and collecting a city tax for the year 1893. The question sought to be raised is the right of the city of Astoria to assess and collect a city tax for said

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year in disregard of the general law of the state. The contention is that the general act amends section 38 of the special act incorporating the city of Astoria, in violation of section 22, article IV. of the constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." The general act—passed at the last session of the legislature, Laws 1893, 116—is entitled "An act to secure a more convenient mode of making assessments and of collecting and paying taxes," etc., and consists of nine distinct sections which, in substance, provide as follows: Section 1 provides for four additional columns to the assessment and tax rolls, to be headed "Cities," "School Districts," "Amt. City Tax," and "Amt. School District Tax," and for inserting the name of the city or school district in which each item of property is assessable. Section 2 provides for listing the cities and school districts in the several counties in alphabetical and numerical order upon a page or pages of the tax roll, with the aggregate value of all the assessable property in each city and district set opposite the name or number thereof. Section 3 provides for taxing property in cities and school districts according to its valuation by the county assessors, and for furnishing the proper officers of such cities and districts with statements of the aggregate valuation of the assessable property in their respective cities and districts. Section 4 provides for annual notice to the clerks of the several county courts of the rate per cent of the tax levy in each city and school district in the respective counties. Section 5 provides for computing the tax upon the property of each individual by the several clerks of the county courts, and extending the same so as to show the aggregate tax of each individual upon his property in the respective cities and districts. Sections 6 and 7 provide for the collection of such taxes, and the payment thereof to the respective

Opinion of the court—LORD, C. J.

cities and school districts for which they were collected. Section 9 provides "That all laws providing for assessors in, or assessments of property by, any school district, incorporated town, or city and all laws in conflict herewith, be and the same are hereby repealed."

By this act the power to assess and collect taxes, conferred on the different cities of the state by their charters, and also upon the different school districts, as well as the duties connected therewith, is transferred to the county officers designated therein. Section 38 of the special act incorporating the city of Astoria provides that its common council shall have power "to assess, levy, and collect taxes for general municipal purposes, upon all property, real and personal, which is taxable by law for state and county purposes." It will be observed that the effect of the general act is to eliminate from section 38 of the special act the power conferred on the common council to assess and collect taxes for municipal purposes, and to transfer it and the duties connected therewith to the officers of the county so designated. This, it is claimed, is such a change or alteration of section 38 as, in effect, amends it without conforming to the requirements of section 22, article IV. of the constitution; and hence that such a change or alteration could not be legally made without setting forth and publishing at full length such section as changed or modified. The question to be determined, then, is whether the general act comes within the scope of the constitutional provision invoked. The language of that provision is both prohibitory and mandatory. By its terms it inhibits the revision or amendment of an act by mere reference to its title, and requires that the act revised, or section amended, shall be inserted at length. It does not purport to limit or restrict the power of the legislature in the enactment of laws; it relates only to the mode or form in which the legislative power shall be exercised. Its prohibition is against legislation effected by modes not in conformity

with its requirements. The evil it sought to remedy was the mode in which the legislative power was sometimes exercised in the enactment of revisory or amendatory laws. This evil, as is well known, was the practice of amending or revising laws by additions or other alterations, which, without the presence of the original law, were usually unintelligible. Acts were passed amending existing statutes by substituting one phrase for another, or by inserting a sentence, or by repealing a sentence, or a part of a sentence, in some portion or section thereof, which, as they stood, often conveyed no meaning, and, without examination and comparison with the original statute, failed to give notice of the changes effected. By such means, an opportunity was afforded for incautions and fraudulent legislation, and endless confusion was introduced into the law. Legislators were often deceived and the public imposed upon by such modes of legislation. To prevent these consequences, and to secure a fair and intelligent exercise of the law-making power, was the object of the constitutional provision in question. This object it accomplished by imposing a limitation, not on the power of the legislature to make laws, but upon the mode in which that power should be exercised in the enactment of amendatory or revisory laws. If the act is in itself complete and perfect, and is not amendatory or revisory in its character, it is not interdicted by this provision, although it amends by implication other legislation upon the same subject. Such an act, although it may operate to change or modify prior acts, is not within the mischief designed to be remedied by said section 22. "Statutes," says Judge COOLEY, "that amend others by implication are not within this provision, and it is not essential that they even refer to the acts or sections which by implication they amend": Cooley, Constitutional Limitations, 152. Hence an act of the legislature, not amendatory in character, but original in form and complete in itself, exhibiting on its face what

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the law is to be,—its purpose and scope,—is valid, notwithstanding it may in effect change or modify some other law upon the same subject.

As the general act under consideration deprives the cities and school districts of the state of the power to assess and collect taxes, a power which had been theretofore conferred upon them by special and general laws, it is claimed that this is such a change or alteration of those laws in that particular as is amendatory, and that, unless the general law sets forth and republishes at length the part or section thereof as amended, it directly falls within the constitutional inhibition, and is void. Hence, as the effect of the act is to take from the city of Astoria the power conferred upon it by section 38 of its charter, to assess and collect taxes, it is amendatory of that section, and for like reason, unconstitutional. This construction of the constitutional provision in question is based on the assumption that any act of the legislature which, in effect, alters or changes an existing law, or part thereof, is an amendment of it, and void, unless it inserts the law at length, or such part as is changed or amended. In support of this construction we are cited to the case of *State v. Wright*, 14 Or. 369 (12 Pac. Rep. 708), in which STRAHAN, J., said: "In legislation, an amendment means an alteration in the draft of a bill proposed, or in a law already passed: Rapalje, Law Dict. Title, Amendment. So that if this act alters the legal effect of the charter of the city of Astoria in a particular already covered and provided for by the charter, then it is to be taken as an amendment of the charter. This is not a case where new and additional powers are added by way of supplement, but the change or alteration of an existing power; and I think it is too plain for argument that it is an amendatory statute." In that case the act under consideration provided, in substance, that "every person obtaining a license to sell spirituous or vinous liquors shall pay into the treasury of the

county, city, or town granting such license the sum of three hundred dollars per annum, and in the same proportion for a less period; or two hundred dollars per annum, and in the same proportion for a less period, for a license to sell malt liquors only; *provided*, that no license shall be granted for a less period than six months; *and be it further provided*, that no license to sell spirituous, malt, or vinous liquors shall be granted by any incorporated city or town for a less sum than that hereinbefore specified," etc. The effect of this act, if valid, was to amend the charter of every city and incorporated town in the state. As the city of Astoria had the power conferred upon it by its charter to license and tax barrooms and drinking shops through its common council, and, in pursuance thereof, had passed an ordinance fixing the sum at two hundred dollars per annum, for which licenses were granted and issued, the effect of the act was to repeal such ordinance in so far as it fixed a different amount for the license than the sum prescribed by the act, and to limit the power of the common council, under the charter, to grant licenses for sums less than those named in the act. While, therefore, the effect of the act was to alter or change to this extent an existing power, it was produced by such act repealing *pro tanto*, by implication, the section of the charter which conferred it. The act itself was complete—its meaning and scope plain and apparent; nor was there anything on its face to evince an amendatory character. It was an independent act of legislation designed to regulate the sale of liquor in the state. When an act of this character so operates as to modify or change prior acts of legislation, it does not fall with the mischief designed to be remedied by the constitution, although the effect is to alter or amend by implication some prior legislation upon the same subject. To hold otherwise, and give this constitutional provision the construction claimed, would be, in effect, to declare that the legislature is powerless to pass

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any act changing or altering in any respect the statute law of this state without reenacting and republishing at length every section of all prior statutes, general and special, that might be affected by the new statute. We do not think that such construction is tenable or sustained by the adjudications. Statutes which amend or repeal others by implication are not obnoxious to the constitution. If, therefore, the general act now in question is complete in itself as an independent act of legislation, although it may operate to change or modify some prior law, it does not fall within the constitutional inhibition, and is valid. In form the act is original, and not amendatory. It does not assume to amend or revise any prior general or special act, or section thereof, but by conferring on the county officers the power to assess and collect taxes for the cities and school districts of the state, it had an amendatory effect by implication upon such prior legislation as conferred that power on such cities and school districts, and by its last section expressly repeals all laws providing for assessors in, or assessments of property in, school districts, incorporated towns, or cities.

The city of Astoria having the power conferred on it by section 38 of its charter, to assess, levy, and collect taxes for municipal purposes, the effect of the general act in conferring upon the county officers the power to assess and collect taxes, but not to levy them, for cities and school districts of the state, was to deprive the city of the right to exercise such power, and, as a consequence, the act operated to change or alter section 38 of the charter of Astoria by striking out the power to assess and collect taxes; or, in other words, it operated to amend such section by repealing, *pro tanto*, that portion of it by implication. But the act does not purport to be an amendment of any previous statute, special or general; it is an independent act of legislation, complete and perfect in itself. The power conferred, and the duties imposed, and all matters

connected therewith, are specified in the body of the act. It shows on its face what the law is to be. Neither the legislators nor the public could fail to discover its purpose and meaning without reference to any prior legislation upon the same subject. It is entitled "An act to secure a more convenient mode of making assessments and collecting and paying taxes," etc., and establishes a new policy of the state in reference to the assessment and collection of taxes. Such an act does not fall within the constitutional provision or mischief intended to be remedied. The adjudications are numerous to the effect that an act which does not assume to amend prior legislation, and is a complete and perfect act in itself,—its purpose and scope apparent on its face,—is not interdicted by the constitution, although it amends by implication other statutes on the same subject. In *People v. Mahaney*, 13 Mich. 496, where a similar provision of the constitution of Michigan was under consideration, it was held that an act establishing a policy of government for an incorporated city, which did not assume in terms to revise, alter, or amend any section of the city charter, was valid, although, by the transfer of the duties from one officer to another, it had an amendatory effect by implication on sections of the city charter which were not reënacted and republished. COOLEY, J., said: "It is next objected that the law is invalid because in conflict with section 25 of article IV. of the constitution, which provides that "no law shall be revised, altered, or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be reënacted and published at length." The act before us does not assume, in terms, to revise, alter, or amend any prior act, or section of an act, but by various transfers of duties it has an amendatory effect by implication, and by its last section it repeals all inconsistent acts. We are unable to see how this conflicts with the provision referred to. If, whenever a new statute

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is passed, it is necessary that all prior statutes modified by it by implication should be reenacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors, and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to reenact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title.

This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section which was only referred to but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, some times drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

This construction of the Michigan constitutional provision was reaffirmed in *People v. Wands*, 23 Mich. 385, and in *Swartwout v. Mich. Air Line R. R. Co.* 24 Mich. 389. In *Everham v. Hulit*, 45 N. J. Law, 53, where a similar provision of the New Jersey constitution was under consideration, DEPUE, J., said: "A construction of this constitutional provision which would sustain the contention of the plaintiff would lead to the most embarrassing results. It would be equivalent to holding that the legislature can pass no act changing any part of the statute law in force in this state without reenacting at length every section in the whole body of existing statutes that might be affected by the new legislation. Since the constitutional amendments went into effect, a considerable number of acts have been passed designed to simplify and make more efficacious the mode of making and collecting assessments for local improvements in the municipalities of this state. These were subjects specially provided for in sections contained in their several acts of incorporation. General acts have also been passed providing for the assessment, collection, and lien of taxes,—subjects specially provided for in sections incorporating cities, towns, and townships, as well as in several parts of the general tax law of this state. In many instances provisions of this kind are contained in long sections in which it is usual to express and define the general powers of corporations; sometimes they are distributed in appropriate places in different sections of the acts. If this constitutional provision has made it necessary to the validity of a new statute on the subject that every prior statute on the same subject which may be altered or modified should be inserted in it at length, it would be quite impossible to legislate at all on the subjects mentioned, or on kindred subjects, for a statute which would comply with such a requirement would probably be obnoxious to that other provision of the constitution, that every law should embrace but one object and that

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object should be expressed in its title." The same rule of construction has been applied in other states: *Braham v. Lange*, 16 Ind. 497; *Lehman v. McBride*, 15 Ohio St. 603; *Pollard v. Woods*, 40 Ala. 77; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Shields v. Bennett*, 8 W. Va. 75; *Baum v. Raphael*, 57 Cal. 361; *Fleischner v. Chadwick*, 5 Or. 155; Cooley, Constitutional Limitations, 183.

In coming to the conclusion reached in this case, we have not overlooked the principle that a general law will not be considered as modifying or repealing a special or local law, except by express words or necessary implication. "Laws special and local in their application," says ALLEN, J., "are not deemed repealed by general legislation, except upon the clearest manifestation of the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end": *People v. Quigg*, 59 N. Y. 88. "But," as was said by DIXON, J., "there is no rule of law which prohibits the repeal of a special act by a general one; nor is there any principle forbidding such repeal without the use of express words declarative of the legislative intent to repeal the entire statute": *New Brunswick v. Williamson*, 44 N. J. Law, 167. The question is one of intention, and the purpose of the general act to modify or repeal the special act must be clearly manifested,—the conflict must be irreconcilable,—in the absence of express words declarative of the legislative intent: *Brown v. City of Lowell*, 8 Metc. 172; *Brown v. County Commissioners*, 21 Pa. St. 42; *State v. Fitzporter*, 17 Mo. App. 273; *Fosdick v. Village of Perrysburg*, 14 Ohio St. 485-6; Sedgwick, Statutory Law, 123. In the case at bar the intent of the general act to interfere with the power conferred by section 38 of the charter is clearly manifest, and the last section is expressly declarative of that purpose.

In *State v. Wright*, 14 Or. 369 (12 Pac. 708), the general and special act, in the particular noted, are not only clearly

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inconsistent with each other, but the act also expressly declares that "no license to sell spirituous, malt, or vinous liquors shall be granted by any incorporated city or town for a less sum than hereinbefore specified." In view of these considerations, in so far as the case of *State v. Wright*, is in conflict with the construction we have given to the constitutional provision in question, it must be considered as overruled, and the judgment in the case at bar must be **AFFIRMED.**

LOVEJOY v. WILLAMETTE LOCKS CO.

[S. C. 34 Pac. Rep. 660.]

24	569
31	235
24	569
47	37

RELIEF FROM JUDGMENT—DISCRETION OF COURT—CODE, § 102.—Under Hill's Code, § 102, providing that the court may relieve a party from a judgment taken against him through his mistake, only a plain abuse of discretion in refusing relief will be reviewed.

Multnomah County: E. D. SHATTUCK, Judge.

Petition of Amos L. Lovejoy and others for relief from a judgment rendered against them in an action by them against the Willamette Transportation & Locks Company. Petition denied, and petitioners appeal. Affirmed.

John W. Whalley, and Dell Stuart, for Appellants.

Julius C. Moreland, for Respondent.

PER CURIAM.—This is an appeal from an order of the circuit court denying the petition of plaintiffs for relief from an original judgment of the court against them. The petition is brought under section 102, Hill's Code, which provides that the court may "relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The record shows that the plaintiffs had commenced an

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action to recover certain real property described therein, and that the court had found against them, and adjudged the defendant entitled to the property as the owners thereof. The petition is based on the fact that the judgment was obtained against the plaintiffs by mistake as to the *locus in quo* in this; that they were claiming in such action an island in the Willamette River other and different from the island claimed by the defendant. There are numerous affidavits filed in support of the petition and against it. It is admitted that a petition for relief from a judgment under said section 102 is addressed to the discretion of the court, and, conceding without deciding, that an order granting or denying such a petition is appealable, the question is, Was the order of the court denying such petition an abuse of its discretion? The judge who denied the petition, tried the cause; he is able and experienced, and familiar with the place and its surroundings where the alleged island or land in dispute lies. While the motion was pending and under consideration, in order to better qualify himself to understand and apply the facts alleged in the affidavits pro and con, he visited the place where the land in dispute lies, and made a careful investigation of the facts as to its location, and after mature consideration refused to allow the relief asked. In view of these facts, the *nisi prius* judge was well qualified to pass an intelligent judgment upon the matter submitted, and it is not enough that we might reach a different conclusion to justify an interference with the exercise of his discretion. There must be not merely error of judgment, but such an exercise of it as amounts to a plain abuse of discretion. Our examination of the record has not satisfied us that the order should be disturbed, and it is therefore **AFFIRMED**.

Per Curiam.

[Argued October 17, 1898.]

BANFIELD v. BANFIELD.

[S. C. 34 Pac. Rep. 659.]

EQUITY—REFORMATION OF NOTE—FRAUD.—Plaintiff purchased from defendant a bond for a deed of land, and at the time of the sale defendant, who had the bond in his possession, stated that there was six hundred dollars, "maybe a little more or a little less," due thereon, supposing such to be the case, but without pretending to have actual knowledge on the subject. For several weeks prior to executing the note in payment therefor, plaintiff had the bond in his possession, but made no attempt to ascertain the actual amount due thereon, though he had the data necessary to the calculation. *Held*, that he was not entitled to a reformation of the note, though the amount due on the bond was three hundred dollars more than the amount stated by the defendant.

Multnomah County: LOYAL B. STEARNS, Judge.

Geo. G. Gammons, for Appellant.

Dell Stuart, for Respondent.

PER CURIAM.—This is a suit by M. C. Banfield against Jacob Banfield to restrain an action at law, and compel the reformation of the note upon which the action is founded. Briefly, the facts are that in September, 1890, the plaintiff purchased of his brother, the defendant, a certain tract of land in Portland for which defendant held a bond for a deed, upon which some twenty-seven monthly installments of ten dollars and interest had been paid and duly endorsed, and as consideration for the purchase, paid six hundred dollars in money and assumed and agreed to pay the balance of the purchase price which defendant was to pay for the property, and some three or four weeks later gave the note in suit for six hundred dollars. At the time of the sale the bond was in the possession of the defendant, and he represented or stated to the plaintiff that there was six hundred dollars, "maybe a little more or a little less," due thereon, he supposing and believing such to be the case, and without having, or pretending to

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have, any actual knowledge on the subject. In fact it is admitted that he did not pretend to have made any definite calculation as to the amount unpaid, nor was he competent to do so. Soon after the purchase the bond was assigned to plaintiff, and at the time of executing the note, and for some three or four weeks prior thereto, was in his possession, but without making any attempt to ascertain the actual amount unpaid thereon, although the data for so doing appeared on the face of the bond, he executed and delivered the note in suit for six hundred dollars. More than a year afterwards, and after he had paid fifteen or sixteen installments of the purchase price, and after he had been sued on the note, he discovered for the first time, as he claims, that instead of six hundred dollars being unpaid on the bond, there was in fact six hundred and sixty dollars unpaid on the principal, and one hundred and fifty-four dollars accumulated interest; whereupon he commenced this suit to have the note reformed by reducing the amount thereof to three hundred and forty-one dollars and forty cents instead of six hundred dollars, the amount for which it was originally given, claiming that he was induced to execute the note by the misrepresentation of the defendant as to the amount unpaid on the bond.

While we concur with counsel for plaintiff that in equity whenever a positive representation of facts is made which are, or may be assumed to be, within the knowledge of the party making it, the receiving party is, in general, entitled to rely and act upon it, and is not bound to verify the truth of the representation by an independent investigation, yet we see no room for the application of the doctrine in this case. The amount unpaid on the bond was a simple matter of calculation which it is admitted defendant was not competent to make, nor did he pretend to have any definite information thereon, and his representation cannot be considered as a positive declaration of

Statement of the case.

a fact within his knowledge, but is rather an expression of an opinion from information equally accessible to both parties, and upon which plaintiff under the circumstances had no right to rely. He was as equally able to form his own opinion and to come to a correct judgment as to the amount unpaid on the bond as the defendant, and cannot justly claim to have been misled by the statement. Hence the decree must be AFFIRMED.

[Decided May 24, 1887.]

¹McDONALD v. MACKENZIE.

[S. C. 14 Pac. Rep. 868.]

24	573
41	607

1. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Ordinarily a debt due by one partner cannot be set-off against a debt due to the firm, even though it is so agreed with the partner owing the debt, yet it may be done with the consent of all the partners.
2. **BILLS AND NOTES—SET-OFF—DEFENSES TO NOTES TRANSFERRED AFTER MATURITY.**²—One who takes negotiable paper after maturity takes it subject not only to equities inherent in the paper, but subject also to all payments, or set-offs in the nature of payments, that may have attached to it in the hands of prior holders.
3. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Where both members of a partnership agree with the maker of a promissory note due to one of them that the amount of such note may be applied to the payment of a demand by such holder against the firm, but the note is assigned after maturity to another person, instead of being cancelled, the one may be offset against the other.
4. **EQUITY—DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.**—Where one has obtained a decree upon a note and mortgage, which was subject to a counterclaim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.

Umatilla County: LUTHER B. ISON, Judge.

In substance the facts are these: The defendants Mackenzie & Cavanaugh are copartners. On the thirty-first

¹ Not heretofore officially reported.

² NOTE.—See an extended citation of authorities on this question in a note on page 327 of 23 L. R. A.—REPORTER.

Statement of the case.

day of June, 1882, the plaintiff McDonald, being indebted to the defendant Cavanaugh, made and delivered to him a certain promissory note, wherein he agreed to pay to the order of said Cavanaugh a sum therein named, etc., and secured the same by a mortgage. On the — of March, 1884, the defendants Mackenzie & Cavanaugh, as partners, were indebted to the plaintiff McDonald, in a sum largely in excess of said note, which indebtedness arose out of a sale of wheat by plaintiff to them. As a part of that transaction, it was agreed by the parties thereto, including Cavanaugh individually as payee of the note, that the said note should be delivered to the plaintiff, and accepted by him as part payment for the wheat, but Cavanaugh neglected to do so and assigned the same to the defendant Smith after its maturity. The plaintiff obtained a judgment upon his wheat transaction against the defendants Mackenzie & Cavanaugh, who are now insolvent, and out of the state. The defendant Smith obtained a decree upon said note and mortgage so assigned to him after its maturity, and has had execution issued thereon, and caused the sheriff to advertise the property of the plaintiff for sale, etc., and, as plaintiff alleges, will, unless restrained, have the same sold, to his irretrievable injury. Plaintiff, therefore, prays that the defendant Smith may be perpetually enjoined from the enforcement of said decree; that the same be set off against the amount of the judgment due the plaintiff from the defendants Mackenzie & Cavanaugh; and that the said Smith be required to surrender said note for cancellation. A demurrer to the complaint having been sustained, and the plaintiff declining to plead further, on motion, the decree from which this appeal is taken was entered. **Reversed.**

Lewis B. Cox, for Appellant.

John J. Balleray, for Respondents.

MR. CHIEF JUSTICE LORD delivered the opinion of the court:

1. From the foregoing statement of the facts, it is manifest that the main object of this suit is to secure a set-off, or what is in the nature of a set-off, between plaintiff's said judgment against the partnership, and the decree obtained by Smith upon the mortgage assigned to him by Cavanaugh under the circumstances above stated. It is insisted by counsel for the defendant Smith, in support of the demurrer, that the complaint does not state facts sufficient to constitute a cause of suit, because the matter alleged would have been no defense to the original suit of *Smith v. McDonald*, as it does not constitute matter of counterclaim, set-off, or recoupment, or any equitable defense. The basis of his contention is that neither at law nor in equity can a debt due to one member of a firm be offset against the joint debt of the partnership, nor can such joint indebtedness be offset against the assignee, for value, of a debt due one of the partners. It is true that a separate debt cannot, ordinarily, be set-off against a joint debt, nor a joint debt against a separate debt, but special circumstances may occur, which, in equity, will justify such an interposition. "Where there is an agreement," said HEMPHILL, C. J., "that a separate debt may be discounted against a joint debt, or conversely, or where it appears that a joint credit was given on account of a separate debt, and also, under other equitable circumstances not necessary to be enumerated; the debts, though not mutual or in the same right, will be allowed to be interposed against each other": *Henderson v. Gilliam*, 12 Tex. 74; Story, Equity, Jurisprudence, § 1437, and notes. While, therefore, a debt due from one partner cannot be set-off against a debt due the firm, (*Williams v. Brimhall*, 13 Gray, 462,) even though so agreed with such partner, (*Evernghim v. Ensworth*, 7 Wend. 326; *Rogers v. Batchelor*,

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12 Pet. 221) yet it may be done if the other partners, knowing of such agreement, have assented thereto": *Eaves v. Henderson*, 17 Wend. 191; *Homer v. Wood*, 11 Cush. 62.

2. It is said, however, that a party who takes a note for value after maturity, acquires it subject to such equities only as are connected with or inhere in the paper, but exempt from all equities arising out of independent and collateral transactions; that, under the law merchant, the note in question passed to the defendant Smith exempt from all rights of set-off on account of independent transactions between the original parties, which are not properly equities. This is undoubtedly the English rule upon the subject: *Burrough v. Moss*, 10 Barn. & C. 558; *Whitehead v. Walker*, 10 Mees. & W. 698; see also Story, Bills, 220; Daniel, Negotiable Instruments, §§ 1435-1437. It is thought, however, that a different rule prevails in this country, although there is some conflict in the decisions: Daniel, Negotiable Instruments, §§ 1435-1437, and authorities cited in note; Waterman, Set-off, § 279, and notes. The decisions adverse to the English rule proceed on the theory that a bill or note endorsed after it becomes due is taken by an indorsee with notice on its face that it is discredited, and, therefore subject to all payments, and offsets in the nature of payments. "Not," as CRESSWELL, J., said, "that he takes the bill subject to all its equities, (*Sturtevant v. Ford*, 4 Man. & G. 106,) but subject to all the equities between the prior parties. It is not perceived how, under the facts, the operation of the English rule can exclude such a defense or equity. In *Burrough v. Moss*, 10 Mees. & W. 698, PARKE, B., said: "If there is an agreement, either expressed or implied, affecting the note, that is an equity which attaches upon it, and is available against any person who takes it when overdue." And in *Oulds v. Harrison*, 28 Eng. L. & Eq. 524, the same distinguished jurist said: "It must be considered as entirely settled by the case of *Burrough v. Moss* that the indorsee of an overdue

bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, payment or satisfaction of the bill itself to such holder. But the indorsee does not take it subject to the claim arising out of collateral matters. There are cases where the bill has been paid, or where the lien has been created on the bill in the hands of the holder, at the time it was due. In that case, the subsequent taker of the bill must take it subject to repayment, or right of action, or that lien, whatever it may be; but the indorsee does not take it subject to the claim arising out of collateral matter. The notice of the existence of the set-off holder of the bill, at the time when it was due, makes no difference, as was settled in the case of *Whitehead v. Walker*, 10 Mees. & W. 698, unless, indeed, express notice was given by the party liable, and evidence of the acquiescence, such as would amount to proof of an agreement to let in the set-off, assented to by both parties; and then it would be in satisfaction of the bill, and depend entirely upon the statute itself."

In *Robinson v. Lyman*, 10 Conn. 34, in which it is supposed the English rule was followed, the court, through CHURCH, J., said: "There was no infirmity, no illegality, nor legal nor equitable defense existing against the note in question, while it remained in the hands of Moore, the payee, growing out of the existence of the note due to Patten & Russell. There was no agreement between the original parties to the note before its transfer, that the defendants should pay to Patten & Russell their note, and have an application thereof upon the note in question. Indeed there was no connection, either in fact or by agreement of parties, between the note in dispute and the debt due to Patten & Russell. If payment had been made, either partially or in full; if there had been a failure or fraud in the consideration of the note, or any illegality therein; or if there had been any agreement between the

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parties affecting the note, before it was transferred to the plaintiff,—these, and other matters which might be suggested, would have created such an infirmity, defense, or equity, as would have attached to the note in the hands of the plaintiff.” See also *Britton v. Bishop*, 11 Vt. 70; *Armstrong v. Noble*, 55 Vt. 431; *Haley v. Congdon*, 56 Vt. 67; *Thretkeld v. Dobbins*, 45 Ga. 145; *Miller v. Florer*, 15 Ohio St. 149; *Farrington v. Bank*, 39 Barb. 646. It is clear, then, that the maker and the payee of a note may, by an agreement made before its transfer, provide in any legitimate way for its payment, and this, if acted upon and performed before such transfer, will operate as a payment or satisfaction of such note. Such an agreement between the parties before the transfer, when carried out, affects directly the note, and whoever thereafter takes such overdue note, takes it subject to the highest equity—the equity of payment.

3. Now the payee of the note in question promised and agreed with the maker,—the firm of which the payee was a member consenting to the arrangement,—at the time, and as a part of the transaction of the purchase by, and sale of a lot of wheat to, the firm, that the said note should be allowed and taken as part payment for said wheat, and in accordance with that agreement the wheat was delivered, and the firm became indebted to the plaintiff in an amount largely in excess of said note. The object of this agreement was plainly to liquidate the note, and operated, when executed, as payment thereof. In *Eaves v. Henderson*, 7 Wend. 192, it was held that an agreement made after the giving of a note, that a debt contemplated to be contracted by the payee with a third person, should be allowed in payment of the note, is a valid agreement, and the debt, when contracted, may be shown in payment of the note under the general issue. Cowen, J., said: “An agreement to apply a subsequent account to be run up by the plaintiff with Nicholls, or with him

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and his partner, the account afterwards being made, and that, too, as here, with the assent of the partner, would inure as payment, beyond all doubt, and come in as such under the general issue: *Kinnerly v. Hossack*, 2 Taunt. 170; *Roper v. Bumford*, 3 Taunt. 76. And an agreement to apply a distinct, independent, precedent debt, the agreement having been made after the note was given, has also recently been held to operate as payment: *Gardiner v. Callendar*, 12 Pick. 374." In the case in hand, the note, instead of being delivered to the plaintiff as was agreed, was transferred, under the circumstances of insolvency as alleged, after its maturity, to the defendant Smith, who is also insolvent. Now, if the note was paid, it being overdue when transferred, Smith took it subject to an infirmity or equity which attached to the note itself, viz., payment. It being overdue, its face gave him notice of its dishonor when transferred, and he took it subject to the same defenses as if it had remained in the hands of the payee. Cavanaugh, certainly, could not admit the facts of that agreement, and the payment effected under it, and maintain an action on the note; neither can his assignee, who, as to such an equity or defense, stands in his shoes. He takes it with notice—for so the law intends—of such equity or defense, and is chargeable therewith. Said TILGHMAN, C. J.: "The counsel for the plaintiff concede that if the holder receive the note, knowing that payments had been made, he shall allow these payments. And why? Because it would be fraudulent not to do so. But if actual notice will affect the holder, so also will implied; because the consequences of actual and implied notice are the same. Now, if a man receive a note under circumstances calculated to excite suspicion, he ought to make further inquiry, and, if he does not, he takes upon himself the knowledge of all the material facts. One of the circumstances which have been held sufficient to excite suspicion, is the note being overdue. Before the day of payment it

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is to be presumed that payment will be punctually made. The note passes from hand to hand on that presumption and its credit is entire. But not being paid, it appears on the face of the note that faith has been broken, or that, for some latent cause, it is questionable whether payment ought to be made": *Cromwell v. Arrott*, 1 Serg. & R. 182. The assignee can always go to the debtor, or to the maker of a note, which is then overdue, and ascertain whether it is paid or not, or what claims he may have against it, before purchasing it. If he neglect to take these precautions, or be indifferent about acquiring knowledge on the subject, he cannot rightfully complain of the consequences with which the law charges him.

4. It is next objected that the bill is an original one to enjoin a decree of the same court. There is no doubt but that the authorities on this subject are somewhat conflicting and not wholly reconcilable. None of those referred to by counsel for the defendant Smith, with the exception of *Dyckman v. Kernochan*, 2 Paige, 26, since expressly overruled by *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, are in point as to this question. The case is quite different when a court undertakes by injunction to restrain or interfere with the proceedings of another court of like jurisdiction. In a proper case, we think that a court of equity may entertain an original bill to enjoin the execution of its own decrees, (*Montgomery v. Whitworth*, 1 Tenn. Ch. 174; *Anderson v. Mullenix*, 5 Lea, 288; 1 High, Injunctions, § 270,) and as at present advised, must reverse the decree and remand the cause. REVERSED.

Statement of the case.

[Decided March 12, 1888.]

***HINDMAN v. EDGAR.**

[S. C. 17 Pac. Rep. 862.]

24	581
37	512

1. **PAROL EVIDENCE TO VARY WRITTEN CONTRACT**—CODE, § 692.—In an action to recover money on a note and a written lease, it is not competent for the defendant to prove that at the time the note and lease were made, the plaintiff agreed to take back from the defendant such goods as he might have left, and such hay and grain as might be on the place, at the expiration of the lease, as this would be varying and materially changing by parol evidence the terms of a written agreement, contrary to the provisions of section 692, Hill's Code.
2. **IDEM.**—It is error to instruct a jury that the terms of a written contract can be affected or varied by a contemporaneous verbal agreement between the parties.
3. **ASSUMPSIT—PROPERTY TAKEN IN PAYMENT OF DEBT.**—Where property is by a debtor delivered to a creditor to be applied on a debt, the creditor is chargeable with either its value, to be determined by the jury, or with its agreed value, as the fact may be; it is error to charge that the creditor is not liable for the value of such property unless he received it at a stipulated price.
4. **LIABILITY OF LANDLORD FOR PROPERTY LEFT BY OUTGOING TENANT.**—A landlord is not liable as a purchaser for property left on the leased premises by the outgoing tenant, and which the landlord never accepted.
5. **PLEADING—ANSWER TO COMPLAINT CONTAINING SEVERAL CAUSES OF ACTION**—CODE, § 73.—In answering a complaint which contains several causes of action, and such answer contains several defenses, each defense pleaded should refer to the cause of action which it is intended to answer as required by section 73 of the Code.

Crook County: J. H. BIRD, Judge.

This is an action to recover two hundred and forty-nine dollars, balance on a promissory note, and four hundred dollars claimed to be due upon a written lease. The answer alleged payment of the note in full, and contains several separate defenses which were relied upon at the trial. It is alleged, by way of further and separate answer, "that at the time of making the said note, and for some time prior thereto, the plaintiff was keeping and

* Not heretofore officially reported.

Opinion of the court—STRAHAN, C. J.

running a store on the premises described in the complaint, and at the time of making the lease the plaintiff and defendant entered into a verbal contract whereby the defendant sold all goods he had on hand, and received as pay therefor the note set out in plaintiff's complaint, and it was then and there agreed, and made part of said contract, that if the defendant had any goods on hand at the the time of the expiration of said lease, the plaintiff would buy the same of the defendant, and pay him therefor, and that the said agreement was a part of and an inducement for the making of said contract of sale of said goods and store, and it was then and there agreed by and between the plaintiff and defendant that at the expiration of said lease the defendant should sell, and the plaintiff buy and pay the defendant for, all hay and grain that the defendant should have at that time; that in pursuance of said contract and agreement the defendant tendered and delivered to the plaintiff at the expiration of said lease, goods, wares, and merchandise to the full aggregate sum of sixty-eight dollars and forty-eight cents, and hay to the aggregate sum of three hundred and eight dollars, and by agreement the plaintiff was to credit the amount on the defendant's note, and on said amount of rent. The reply put the new matter in the answer in issue. The jury found for the plaintiff in the sum of sixty-eight dollars and forty-eight cents, for which judgment was duly entered, and from which this appeal was taken. Reversed.

Nicholls & Johns, for Appellant.

Geo. H. Barnes, and *Tilmon Ford*, for Respondent.

MR. CHIEF JUSTICE STRAHAN delivered the opinion of the court:

The appellant makes several assignments of error which we will proceed to notice.

1. The defendant being on the stand as a witness, his counsel asked him this question: "What were the circumstances under which the note set out in the plaintiff's complaint was given?" To this plaintiff objected; and, his objection being overruled, he excepted, and the witness answered: "At the time of and before said note and contract of lease was signed, the plaintiff agreed to take back from him (defendant) such goods as he (defendant) might have left, and also such hay and grain as he (defendant) might have left on said place at the expiration of said lease." The defendant moved to strike out this answer for the reason that it was incompetent, because its effect was to vary the terms of the written agreement. The motion was overruled, to which an exception was taken. This evidence was clearly incompetent. It brought before the jury for their consideration a contemporaneous parol agreement, the effect of which was to vary and materially change the terms of the written agreement made between the parties. The Code, § 692, provides, in effect, that when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms; and this is declaratory of an elementary rule of evidence. This evidence should have been excluded from the consideration of the jury, and, in refusing to do it, the court erred. There was other evidence of the same character offered and objected to, and admitted notwithstanding the objection, to which exceptions were duly taken. None of the evidence which sought to introduce either an antecedent or contemporaneous parol agreement was competent, and in admitting it the court erred.

2. The court gave to the jury the following instruction: "The mere fact that the defendant left some store goods and hay on the place when he left would not make the plaintiff in any manner answerable to him therefor, unless you further find that the defendant's allegations in relation to the alleged agreement with the plaintiff con-

Opinion of the court—STRAHAN, C. J.

cerning said goods and hay have been sustained by a preponderance of the evidence." This instruction, in effect, said to the jury that if the defendant had made the best case before them as to the existence of this alleged parol contemporaneous agreement, they should find according to preponderance of the evidence on that subject, and give effect to such agreement. Such instruction was based on evidence that was incompetent, and was necessarily erroneous. It impliedly, and in effect, told the jury that such antecedent and contemporaneous parol agreement did add to and vary the written agreement, and that the liabilities of the parties were to be measured by such parol agreement, and not exclusively by the writing. This instruction was, therefore, clearly erroneous. The appellant's counsel asked the court to instruct the jury as follows: "I charge you that any evidence tending to show that any undertaking or agreement was had between plaintiff and defendant, at the time of executing said written contracts herein sued on, or at any time prior thereto, tending in any manner to vary the terms of the aforesaid written contracts, must be by you wholly disregarded." This instruction was refused and is a repetition of the same error already pointed out.

3. The plaintiff's counsel also asked the court to give to the jury the following instruction, which was refused: "I charge you that you must not allow any credits to defendant, on said contracts or otherwise, other than cash credits, unless you find that plaintiff agreed to receive, and did receive, the same at an agreed and stipulated price." This instruction was properly refused. If the plaintiff accepted property of the defendant to be applied in payment of said contracts, he thereby became chargeable with its value, and his liability does not depend on whether he had agreed on a stipulated price or not. If no price was agreed upon, the jury could ascertain the value of the property which the plaintiff received from the defendant.

4. The plaintiff also asked the court to instruct the jury as follows: "If you find from the evidence that defendant abandoned the leased premises named in said contract of lease, and left certain or any personal property there, and that the same was left there without the consent of plaintiff, and that the plaintiff had or has not accepted the same as a payment or part payment, at a stipulated price or otherwise, then such personal property cannot be considered by you as a payment or part payment in any manner." This instruction was also refused, and in this we think the court committed error. If the defendant abandoned the premises, and left property there which the plaintiff never accepted, then he was not liable for its value. This, in effect, was what the court refused to instruct the jury, and such refusal was clearly erroneous. If the defendant left any property on the place for the plaintiff when he left or abandoned it, and the plaintiff accepted such property, he thereby became liable to the defendant for its value, without any regard to the alleged contemporaneous parol agreement. In such case his liability depends upon the fact of his acceptance of the property, and in no way upon said alleged agreement.

5. The defendant by his answer has undertaken to plead a number of defenses and counterclaims, but they are presented in such a confused manner that it is somewhat difficult to apply the correct rule of law to each. In preparing the answer no attention whatever seems to have been paid to that requirement of the Code, § 73, which provides that * * * "the defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished." It might happen that certain matters would constitute a good defense to one cause of action, but would be no defense whatever to another cause of action pleaded in the same

Per Curiam.

complaint. In this, and in fact in every case where there are several causes of action set out in the complaint, and the answer contains a number of defenses, the particular causes of action which each defense is intended to meet ought to be designated in the answer. We are led to make these observations by the manner in which counsel for respondent has presented the questions arising on the record in his brief. His argument seems to overlook the state of the record.

Let the judgment be REVERSED and a new trial be awarded.

[Decided March 29, 1892.]

***HUMMEL v. FRIESE.**

[S. C. 29 Pac. Rep. 438.]

APPEAL—REFEREE'S REPORT—CONFLICTING EVIDENCE.—Where the only question involved is one of fact, and the evidence, though conflicting, supports the referee's report, the decree will be affirmed.

Multnomah County: **LOYAL B. STEARNS, Judge.**

Suit in equity by W. F. Hummel and Frank Hummel against A. H. and Louise Friese to remove a cloud from the title to certain real estate. A decree was rendered in favor of plaintiffs, and defendants appeal. Affirmed.

R. & E. B. Williams & Carey, Edw. Mendenhall, and Frank B. Jolly, for Appellants.

Killin, Starr & Thomas, for Respondents.

PER CURIAM.—The complaint is in the usual form. The answer denies the allegations of the complaint, and affirmatively alleges that on February 16, 1880, the defendant Louise Friese purchased from plaintiffs' grantor the property in controversy, together with other property

* Not heretofore officially reported.

Per Curiam.

adjoining on the east, but that by mutual mistake the property in suit was omitted from the deed, all which was denied by the reply. After issue joined the cause was referred to Hartwell Hurley, Esq., to report the facts and the law. After argument of counsel and consideration of the testimony, he made a report in favor of plaintiffs, which was confirmed by the court. The question is one of fact and not of law, and it is sufficient to say that after a careful examination of the evidence we are of the opinion that there was no error in the decree of the trial court, and it is therefore **AFFIRMED**.

[Decided March 29, 1892.]***BUCHTEL v. BODE.**

[S. C. 29 Pac. Rep. 428.]

APPEAL—REFEREE'S REPORT—WEIGHT OF EVIDENCE.—A decree in equity supported by the evidence will be affirmed on appeal, when the only question is one of fact.

Multnomah County: **LOYAL B. STEARNS**, Judge.

Suit by Joseph Buchtel against Frank Bode to redeem fifty shares of the capital stock of the City View Park Association, which plaintiff claimed to have transferred to defendant as collateral security for the payment of a debt. There was a decree for defendant, and plaintiff appeals. Affirmed.

Hall & Showers, and *R. & E. B. Williams & Carey*, for Appellant.

Dolph, Bellinger, Mallory & Simon, and *Sears & Beach*, for Respondent.

PER CURIAM.—The only question in the case is one of fact, and is whether the transfer of the stock was as a

*Not heretofore officially reported.

Per Curiam.

pledge or an absolute sale. The evidence has been carefully examined, and we think it fully supports the defendant's contention, and the decree of the court below is therefore **AFFIRMED**.

HOFFMAN v. BRANCH, AUDITOR.

Multnomah County: E. D. SHATTUCK, Judge.

PER CURIAM.—The only question presented in this case is the constitutionality of the act, (Laws, 1893, p. 171), to provide for an issue of bonds for the improvement of streets and the paving of the same in incorporated cities, and for the payment of costs thereof by installments. This case is within the principle announced by this court in the case of *Warren v. Crosby*, *ante*, p. 558 (34 Pac. Rep. 661), and the act in question is constitutional, and the judgment of the court below is reversed and the cause remanded for such further proceedings as may be necessary and proper.

RULES OF THE COURT.

THE RULES

OF THE

SUPREME COURT OF OREGON.

Adopted, August 2; to take effect, October 1, 1894.

TRANSCRIPTS—PREPARATION OF.

RULE 1. Transcripts on appeal in civil cases, unless otherwise directed by the appellant, shall include only a copy of the judgment roll,—that is, the pleadings upon which the cause was tried, summons and proof of service thereof, bill of exceptions, orders relating to a change of parties, the entry of judgment, and such other journal entries or orders only as involve the merits and necessarily affect the judgment, the notice of appeal, and any order enlarging the time in which to file the transcript, and a certificate of the clerk of the filing of the undertaking; and in criminal cases, the indictment and demurrer, if any, the journal entries of the plea, trial, verdict, and judgment, and any other order involving the merits and necessarily affecting the judgment, the bill of exceptions, if there be one, and the notice of appeal and certificate of probable cause, if any. If the appeal is from a decree, the transcript shall be accompanied by the original testimony, depositions, and other papers containing the evidence heard or offered on the trial, certified to by the clerk of the court below. (Code, §§ 272, 541, 1413, 1444.)

RULE 2. Every transcript shall be on legal-cap paper, written or printed on one side only, shall be chronologically arranged, and prefaced with an index specifying the first page of each separate paper, order or proceeding, and

Rule 2.	
24	591
32	97
24	591
Rule 4, 591	
36	420
36	555
Rule 9, 591	
36	400
36	555
Rule 19, 591	
36	371
36	444

in civil cases shall be made in substantially the following form:—

TRANSCRIPT.

John Doe, Appellant (or Respondent), v. Richard Roe, Respondent (or Appellant).

Appeal from the circuit court of ——— County.

Hon. ———, Judge.

A. B., attorney for Appellant.

C. D., attorney for Respondent.

Be it remembered, that heretofore, on the ——— day of ———, 189—, a

COMPLAINT

Was filed in the office of the clerk of the circuit court in and for the county of ———, in words and figures as follows: (Here insert complaint in full.)

And afterwards, on the ——— day of ———, 189—, there was filed in the office of said clerk a

SUMMONS,

In words and figures following, to wit: (Here insert summons in full. All endorsements to be upon the face and not upon the back of the leaf.)

Upon which (or attached to it) was a return as follows: (Copy return in full.)

And afterwards, on the ——— day of ———, 189—, there was filed in the office of said clerk a

DEMURRER (OR MOTION)

To said complaint, as follows: (Here copy demurrer or motion in full.)

And afterwards, on the ——— day of ———, 189—, it being the ——— day of the ——— term of said court, the following

ORDER

Overruling (or sustaining) said demurrer (or motion) was made: (Copy order in full. Proceed in same manner as to all motions or demurrers to the complaint.)

And afterwards, on the — day of —, 189—, there was filed in the office of said clerk an

ANSWER,

In words and figures, as follows: (Here insert answer in full. If a motion or demurrer to the answer was filed, note the fact in the manner indicated above in regard to a motion or demurrer to the complaint.)

And afterwards, on the — day of —, 189—, the plaintiff filed his

REPLY,

In words and figures, as follows: (Here set out reply in full. If motions or demurrers were filed to the reply, proceed as indicated above for complaint.)

And afterwards, on the — day of —, 189—, it being the — day of — term of said court, the cause came on for trial, when the following proceedings were had: (Here insert journal entry in full. If the cause was heard before a jury and the verdict was not returned until a subsequent day, proceed as follows:)

And afterwards, on the — day of —, 189—, it being the — day of said term, the jury returned the following

VERDICT.

(Here insert verdict in full.)

And afterwards, on the — day of —, 189—, it being the — day of said term, the following

JUDGMENT

Was rendered: (Here insert copy of judgment entry.)

And afterwards, on the — day of —, 189—, the plaintiff (or defendant) filed his

BILL OF EXCEPTIONS,

In words and figures, as follows: (Here insert in full the bill of exceptions.)

And afterwards, on the — day of —, 189—, the plaintiff (or defendant) filed his

NOTICE OF APPEAL,

In words and figures, as follows: (Here insert notice of appeal in full). Upon which was the following return or proof of service: (Copy return in full. Then add the certificate of the clerk of the filing of the undertaking on appeal as required by statute, together with a certificate to the transcript. Should the clerk doubt what the paper is, let him call it "Paper, in words and figures following." When a paper is filed in term time, add the day of the term to the day of the month.)*

RULE 3. Transcripts and testimony must be paged by numbering the leaves consecutively to the end on the bottom of the leaf near the left-hand corner, and the name of the paper or witness must be written thereon on the left-hand margin near the bottom. The testimony must be preceded by an index in which shall be noted the first page of the testimony of each witness. No transcript shall

* NOTE.—The foregoing form is intended only as a suggestion, and is to be varied according to the circumstances of each particular case. The actual facts of the case will dictate what is to be done, but in all cases, civil as well as criminal, the transcript is to be prepared substantially in conformity with the above form, giving the proper order and date of filing papers, and incorporating them at the proper date as to the proceedings of the court, omitting from the transcript all unnecessary papers, such as undertakings on appeal, cost bills when not involved therein, as well as papers and orders which have ceased to perform any office in the case, such as demurrers and original pleadings when superseded by amended ones or waived by pleading over, unless such original pleadings are necessary to a proper understanding of the questions to be presented on appeal. The title of the court and cause, unless otherwise directed, may be omitted from all papers except the first paper in the cause, but the word "title" shall be used, the character of the paper, whether complaint, summons, answer, etc., shall be designated. The file marks and endorsements may also be omitted, unless otherwise directed.

be filed by the clerk unless prepared in compliance with the foregoing rules, except by special order of the court or one of the justices thereof.

PRINTING AND SERVICE OF ABSTRACTS AND BRIEFS.

RULE 4. Within twenty days after the transcript is filed in a civil case, the appellant shall serve upon the attorney for each respondent a printed copy of so much of the record prepared, as hereinafter provided, as may be necessary to a full understanding of the questions presented for decision, and file with the clerk of this court proof of such service together with twelve copies of said abstract, and no case shall be docketed for hearing until this and other rules are complied with, except by order of the court. In case of cross-appeals, the party first giving notice of appeal shall, under this rule, be considered the appellant. Criminal cases may be tried on the transcript, or a printed abstract, as the appellant may elect, but if upon abstract it shall be prepared, served, and filed as near as practicable in the same manner as required in civil cases.

RULE 5. If the respondent shall deem the appellant's abstract imperfect or unfair, he may, within ten days after receiving a copy thereof, deliver to the appellant's counsel one, and to the clerk of this court, with proof of service upon appellant, twelve printed copies of such further or additional abstract as he shall deem necessary to a full understanding of the questions involved in the appeal.

RULE 6. Within twenty days after the service of the abstract as required by rule four, and within the same period after the transcript is filed in criminal cases, if no abstract is served, where the appeal presents only questions of law upon the rulings of the court below, the appellant shall serve upon the attorney for each of the respondents one copy of his brief, and deliver to the clerk of this court, with proof of service upon respondent, twelve copies thereof, and within twenty days thereafter the re-

spondent shall serve upon the attorney for the appellant one copy and deliver to the clerk twelve copies of his brief, with like proof of service, and the appellant shall have ten days thereafter in which to serve upon respondent one copy and deliver to the clerk twelve copies of a reply brief with proof of service if he so desires. But where the appeal is from a decree and to be tried anew upon the transcript and evidence accompanying it the plaintiff shall open and close, and as to printed briefs shall observe the rules requiring the service and filing of such brief by appellant. A failure by appellant to comply with this rule within the time required, or such modification thereof as may be made, shall be deemed and considered as an abandonment of the appeal, and a failure by the respondent as a waiver of the right to be heard.

RULE 7. All abstracts and briefs shall be printed upon unruled white paper, from either small pica or pica type, single leaded. The size must be six and one quarter by nine and one half inches, and the printed page shall be twenty-two by thirty-nine ems, pica, exclusive of folio at head of the page; the outer, top, and bottom blank margins of each page to be one and one half inches wide. The cover, or if no cover is used, the first page, shall set forth the title of the case, designating the appellant and respondent, the term of this court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided, and of counsel for the respective parties, and the party in whose behalf the same is filed, whether appellant or respondent.

RULE 8. The printed brief and argument shall state the several propositions of law claimed by the party making such brief or argument to be involved in the case, and the authorities relied upon in support of the same separately from the argument. The points and authorities must be first distinctly stated and the argument set forth supplementary thereto. When an authority cited is an adjudicated case, the brief or argument must show the

names of the parties, the volume in which reported, and the page or pages containing the matter to which counsel desires to call the attention of the court. When the reference is a textbook the number or date of the edition must be stated, with the number of the volume and page. In suits in equity the brief shall also contain such portions of the evidence as may be deemed material, giving the name of the witness, and may be in either a narrative form or by question and answer.

RULE 9. The printed abstract of the record must be accompanied by a complete index of its contents, and shall be made substantially in the following form:—

24 544
Rule 9
40 391

IN THE SUPREME COURT OF THE STATE OF OREGON.

— term, 189—.

JOHN DOE, Appellant (or Respondent),
v.
RICHARD ROE, Respondent (or Appellant).

APPELLANT'S ABSTRACT OF RECORD.

Appeal from the judgment of the circuit court for ——— county; Hon. ———, Judge.

A. B., attorney for Appellant.

C. D., attorney for Respondent.

On the ——— day of ———, 189—, the plaintiff filed in the circuit court for ——— County a

COMPLAINT,

Stating his cause of action (or suit), as follows: (Set out all of the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts; as, for example, if the exhibit be a deed or mort-

gage, and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared it is useless to encumber the abstract with the summons, or the return of the officer. Append to the abstract of each paper a reference to the page of the transcript on which it will be found.)

On the — day of —, 189—, the defendant filed a

DEMURRER

To the said complaint, setting up the following grounds: (State only the grounds of demurrer, omitting the formal parts. If the pleading was a motion, and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue.)

And on the — day of —, 189—, the same was submitted to the court, and the court made the following rulings thereon: (Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract; and if no question is to be raised on the appeal growing out of the rulings of the court upon motions or demurrers, no mention should be made of them in the abstract, but it should continue.)

And on the — day of —, 189—, the defendant filed his

ANSWER

To the complaint as follows: (Here set out so much of the answer as may be necessary to explain the questions raised on the appeal, and no more, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the complaint. Frame the record so that it will properly present all questions to be reviewed and raised before issue was

joined, and none other. When the abstract shows issue joined, proceed.)

On the — day of —, 189—, said cause was tried by a jury (or the court as the case may be), and on the trial the following proceedings were had: (Set out so much of the bill of exceptions, or the substance thereof, as is necessary to show the ruling of the court to which exceptions were taken during the progress of the trial and which will be urged as error on the appeal, and no more.)

After the evidence and the arguments of counsel were concluded, the plaintiff (or defendant as the case may be) asked the court to give the following

INSTRUCTIONS

To the jury: (Set out the instructions referred to and continue); each of which the court refused; to which said several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury: (Set out the instructions.)

To the giving of those numbered (give the number), and to the giving of each thereof, the plaintiff (or defendant) at the time excepted.

VERDICT.

On the — day of —, 189—, the jury returned into court with the following verdict: (Set out the verdict, if necessary to a perfect understanding of the questions presented; if not, state the party in whose favor rendered.)

And on the — day of —, 189—, the following

JUDGMENT

Was entered: (Set out the judgment entry appealed from or so much thereof as may be necessary.)

And afterwards, on the — day of —, 189—, the plaintiff perfected an appeal to the supreme court of the state of Oregon, by serving upon the defendant a notice of

appeal. (If a supersedeas bond was filed, state the fact.)

ASSIGNMENT OF ERRORS.

And the appellant herein says there is manifest error on the face of the record in this: (If the appeal is from a judgment in an action at law, set out such of the assignments of error in the notice of appeal as will be relied upon, and no other; if from a decree, state briefly the errors which will be relied upon. To the abstract of each paper and entry append a reference to the page of the transcript on which it will be found. This, however, will not be necessary when the case is, by stipulation of counsel, submitted on the printed abstract without the transcript. This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is,—preserve everything material to the questions to be decided, and omit everything else.)

RULE 10. On the hearing in this court, where an abstract has been served, no questions appearing upon the record will be examined or considered, except such as may arise upon the assignments of error as contained in the printed abstract, unless by permission of the court.

RULE 11. When for any reason a strict compliance with the rules relating to the preparation and service of abstracts or briefs becomes impossible or inconvenient, and a waiver or modification thereof, or an extension or shortening of time is desired in any case, the party desiring such waiver or modification or change of time, may at any time before he is in default apply to any justice of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be made in writing, and shall set out the particular facts relied upon by the applicant, and shall be

Rule 10.
24 600
32 87

24 599
Rule 10
40 391

certified to by counsel as being true and made in good faith. The order, if made by the court, shall be entered in the journal, and if by one of the justices, filed with the clerk. In no case will these rules, or any of them, be waived or suspended or modified upon agreement of counsel only.

RULE 12. The clerk shall make the following distribution of all printed abstracts and briefs received under the foregoing rules: Two copies to each justice of the court and to the reporter, one copy to the state library, and one to be filed in his office.

RULE 13. All civil causes on appeal to this court may, by stipulation of the parties, be heard and determined upon a printed abstract alone, without the preparation or filing of a formal transcript, and in such case the copy of the printed abstract when filed with the clerk within the time in which a transcript is required to be filed shall be considered and stand for the transcript.

RULE 14. In case the appellant shall fail or neglect to serve and file abstracts or briefs as required by the rules of this court, or in case of an abandoned appeal, the opposite party may, by presenting a copy of the judgment or decree, undertaking, notice of appeal, and proof of service thereof, have the judgment or decree affirmed on motion, and if it appear to the satisfaction of the court that the appeal was taken for delay only, may recover such damages as the court shall order.

DOCKETING CAUSES.

RULE 15. After the rules in regard to service and filing of abstracts and briefs have been complied with, the cause shall be put upon the trial docket in its proper order.

RULE 16. Causes on the trial docket will be set down for argument as near as convenient in the order of their entry, due notice of which will be given to the attorneys of the respective parties by the clerk, but the court may

in its discretion direct causes to be set down for argument out of their order.

WITHDRAWING PAPERS.

RULE 17. No paper on file with the clerk shall be taken from the courtroom or office of the clerk, except by order of the court or one of the justices; *provided*, either party may withdraw the transcript of the record and testimony for the purpose of making abstracts or briefs upon giving a receipt therefor to the clerk, and upon such withdrawal may retain the same for ten days, and no more.

MOTIONS—SERVICE AND HEARING.

RULE 18. The second Monday of the term, and each Monday thereafter, shall be motion day, at which time all motions, proper notice of which has been given, shall be heard.

RULE 19. All motions, and the affidavits or documents in support thereof, must be filed with the clerk, and, except as otherwise provided, served by copy upon the opposite party or counsel ten days before the date specified in the motion for the hearing. The opposite party shall then have five days to file and serve papers on the other party or his counsel in resistance to the same, and no paper shall be regarded which does not appear to have been so served. The court may, on application, by order, shorten the time for service.

REHEARING.

RULE 20. All applications for rehearing shall be by petition in writing or printing, signed by counsel, setting forth wherein it is claimed the court has erred, and shall be filed within twenty days next after the filing of the opinion. Counsel may accompany the petition with a brief of the authorities upon which they rely in support thereof, but no oral argument shall be heard thereon.

RULE 21. The filing of a petition for a rehearing shall suspend further proceedings under the decision until the petition is disposed of, unless the court in term time, or the justices in vacation, shall otherwise order.

MANDATE.

RULE 22. Upon the disposition of a petition for rehearing, or if within twenty days after final judgment or decree no petition shall have been filed, the clerk shall, on the application of either party, if made within sixty days thereafter, as a matter of course, issue and forward to the clerk of the court below a mandate upon payment by such party of any balance due him for fees in the case. After the expiration of said sixty days no mandate shall issue, except by order of the court, and upon such terms as it may impose.

COSTS.

RULE 23. It shall be the duty of the clerk in taxing costs to allow the prevailing party the actual cost of printing his abstract or brief (not to exceed one dollar a page, including cover, for a single abstract or brief, printed in pica, and one dollar and twenty-five cents a page if printed in small pica), unless in equity cases for special reasons apparent in the record it is otherwise ordered.

RULE 24. In taxing costs the clerk shall not tax costs for any matter included in the transcript contrary to these rules, unless specially directed by the court to do so.

PRACTICE.

RULE 25. The mode of review of final decisions of the circuit court, when the course of proceeding is not specifically pointed out by statute, shall be by appeal as in cases or actions at law, but questions of fact shall not be considered upon such appeal, unless made a part of the record by a bill of exceptions.

ADMISSION TO THE BAR.

RULE 26. The second day of the October term, and such other time at any term as may be ordered, on the written application of five or more persons desiring admission, shall be set apart as the time when persons desiring admission to practice as attorneys in the courts of this state may appear and present their applications, who having been examined in open court touching their qualifications for admission and found duly qualified, may be admitted to practice as attorneys and counselors at law in the several courts of this state. Application for admission can only be made to this court.

RULE 27. Applicants for admission as attorneys shall be examined by the justices of the supreme court, or under their direction, and only such shall be admitted as shall be properly learned in the common law, the law merchant, the principles of equity jurisprudence, the history and constitutional law of England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of this state, and the practical administration of the law. Such examination shall be conducted in writing, or partly in writing and partly orally, as the court may direct.

RULE 28. Each applicant for admission must produce the certificate of some attorney in good standing in this court that such applicant, if a graduate of some college or other literary institution authorized to confer degrees, has read law two years, or if not a graduate, at least three years; and that such applicant has the requisite learning and ability. There shall also be presented the certificate of two attorneys of like standing to the effect that such applicant is a man of good moral character. In case, however, the applicant produces a diploma from any regular law school or shows that he is a graduate thereof, then the certificate of his having read the time above indicated shall be dispensed with. The applicant shall also file his

own affidavit that he is a citizen of the United States and of this state, or has complied with the statutory requirements in that connection, is over the age of twenty-one years, and has read the books, a list of which is included in his affidavit.

RULE 29. Attorneys and counselors at law and solicitors in chancery who have been admitted to practice in the highest courts of any other state, territory, or district, or of England, her colonies, or dependencies where the common law prevails, and who are otherwise qualified, may be admitted to the bar of this state without examination upon presenting their certificate of admission to such courts, accompanied by a petition in writing, verified by the oath of the petitioner, showing (1) where he was first admitted to practice, all places, and the periods of time during which he has practiced as an attorney or counselor at law, and especially the place, the period of time, and the court before whom he last practiced; and (2) whether or not any proceedings for his disbarment or suspension have been instituted or prosecuted at any time or place. Such petition must also be accompanied by the certificate of the presiding judge of the highest court in which he last practiced, or was admitted to practice, to the effect that the petitioner was in good standing and trustworthy in his profession in such jurisdiction, and also the certificate of two attorneys of this court to the effect that they believed him to be a reputable attorney and a person of good moral character. Such applicant may, if deemed qualified by the court, be licensed to practice law for a period of nine months from and after the date of such license, and the clerk of this court shall immediately notify the secretary of the state bar association of such order; *provided, however*, that if such license shall expire during any vacation of this court, then, and in that event, such license shall continue in force until the third Monday of the succeeding term of this court held at Salem. In the event that any objection is made to the admission

of any person to practice law in this state, such objection shall be made in writing, setting forth the grounds thereof, and shall be filed with the clerk of this court, and may, at the discretion of the court, be referred to three attorneys appointed by the court for investigation and report, under such conditions as may be set forth in the order of reference; *provided, however*, that the court may, at its discretion, either continue or revoke the temporary license pending such investigation and report. In case no objection is so made and filed within six months after the making and entry of the order granting the temporary license to practice, then such applicant at any time after the expiration of the said six months may, on written motion of an attorney of this court, be permanently admitted to practice law in the courts of this state.

DIMINUTION—OF RECORD.

RULE 30. For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and upon good cause shown, obtain an order that the proper clerk certify up the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be absent, or if the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

PAPERS—ORIGINAL, HOW BROUGHT UP.

RULE 31. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district, that original papers or exhibits of any kind should be inspected in this court, such judge may make such order for the safe keeping, transporting, and return of such papers or exhibits as to him may seem proper, and this court will

receive and consider such papers or exhibits in connection with the transcript of the proceedings.

PENDLETON TERM.

RULE 32. The rules governing the preparation and service of abstracts and the service of briefs shall not apply to cases for hearing at Pendleton, but such causes may be heard on the transcript. When practicable the brief of appellant shall be served and filed at least five days before the first day of the term, and that of the respondent by or on the first day.

RULES—WHEN TO TAKE EFFECT.

RULE 33. These rules shall take effect and be in force from and after the first day of October, 1894, but shall not apply to cases on the docket of the present term; and if the transcript of any cause for the next term shall have been filed before these rules go into effect, the time for the preparation and service of abstracts and briefs shall commence and run from the first day of October next.

I hereby certify that the foregoing rules were this day adopted by the supreme court of the state of Oregon, to take effect on the first day of October, 1894, at which time all rules of the court not incorporated therein will cease to be of force, except as to pending cases of the present term.

J. J. MURPHY,

August 2, 1894.

Clerk.



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2. **INSOLVENT CORPORATION—LIABILITY OF DIRECTORS.**—The directors of an insolvent milling company leased the corporate property to themselves and operated the plant at a profit; *held*, that the directors are liable to account to the creditors of the corporation for the profits under the lease, but neither the wheat bought by the directors to be ground, nor the flour made from such wheat, is liable to attachment as the property of the corporation.—*Hutchinson v. Bidwell*, 219.
3. **DISSOLUTION OF PARTNERSHIP—RECEIVER.**—In a suit for the dissolution of a partnership, and an accounting, the court should appoint a receiver to convert the property into cash, and should award each partner his share of the net assets, after payment of firm liabilities, less what he may have already received.—*Durkheimer v. Heimer*, 270.

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1. **STATUTE OF LIMITATIONS—BOAT LIENS—ACCOUNTS—CODE**, § 3706.—Where materials are furnished from time to time as they are needed in the construction of a vessel, and several payments are made on account, all the items constitute one continuous account, and the limitation of one year provided by section 3706, Hill's Code, for enforcing a lien for such materials, does not begin to run against each item as it was furnished, but begins from the date of the last item.—*The Victorian*, 121.
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ACCOUNTS—CONCLUDED.

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1. **PRINCIPAL AND AGENT—LIMITATION OF ACTION.**—A cause of action does not accrue in favor of a principal against an agent until the expiration of the time fixed by the terms of the agency, or a demand by the principal.—*Quinn v. Gross*, 147.

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2. **IDEM.**—A claim by a daughter against the estate of her father for the proceeds of land sold by him seventeen years before his death, under a power of attorney appointing him her agent to sell her real property and care for the proceeds, is not barred by the statute of limitations until the statutory period after the termination of the agency, or after notification by the agent to the daughter that the proceeds of the sale were at her disposal.—*Quinn v. Gross*, 147.
3. **STATUTE OF LIMITATION—SUFFICIENCY OF EVIDENCE.**—In an action by a principal to recover money collected by an agent, it is sufficient to show the agency, the collection of the money, and that the principal had no knowledge of this until within the statutory period of limitation; there need not have been any affirmative act of concealment by the agent, it is sufficient that the principal did not know of the collection.—*Quinn v. Gross*, 147.

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2. **PARTNERSHIP ACCOUNTING—AWARD ON ARBITRATION.**—An award which undertakes to state an account between two partners under an agreement authorizing the arbitrators to examine the books, accounts, and writings of a firm, and determine the profits or losses, the share owned by each of the partners in the plant, and the other profits of the business, and providing that the award shall be binding as a correct statement of the profits or losses of the firm, and of the share or interest of each partner, the arbitration being made for the purpose of enabling either partner to purchase the interest of the other—is not consonant with the submission, and is no bar to an action by one partner against the other for a dissolution of the partnership and an accounting.—*Garrow v. Nicolai*, 76.
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ASSESSMENTS—CONCLUDED.

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1. **ASSIGNMENT—CORPORATIONS—ULTRA VIRES.**—The fact that a corporation was not by its articles authorized to deal in a certain kind of property, will not justify it in refusing to pay for the same on the ground that the purchase was *ultra vires*, where there is no special prohibition against the purchase, and the goods are retained. A general assignee is subject to the same duties and obligations as his assignor in this regard, and if he retains the property so purchased he must pay for it.—*Assignment of Pendleton Hardware Co.*, 330.
2. **INSOLVENT ESTATES—PRESENTATION OF CLAIMS.**—In presenting claims against insolvent estates no special form of pleading is required—it is enough to shew an indebtedness from the insolvent, and, if questioned, the particulars of it can be shown.—*Assignment of Pendleton Hardware Co.* 330.
3. **CORPORATIONS—PROMISSORY NOTE—CLAIM AGAINST ASSIGNEE.**—A note, the execution of which was authorized by a corporation for the purpose of paying another note due by it, and used for that purpose, but which was inadvertently made by its officers without signing the name of the corporation thereto, and was taken up when due by certain of the signers, is a proper claim by such signers against the corporation and its assignee in insolvency.—*Assignment of Pendleton Hardware Co.* 330.

ASSUMPSIT.

ASSUMPSIT—PROPERTY TAKEN IN PAYMENT OF DEBT.—Where property is by a debtor delivered to a creditor to be applied on a debt, the creditor is chargeable with either its value, to be determined by the jury, or with its agreed value,

ASSUMPSIT—CONCLUDED.

as the fact may be; it is error to charge that the creditor is not liable for the value of such property unless he received it at a stipulated price.—*Hindman v. Edgar*, 581.

ATTACHMENT AND ATTACHMENT BONDS.

1. **LIABILITY OF SURETIES ON ATTACHMENT BONDS—COSTS—CODE, § 146.**—The sureties on an undertaking in attachment which complies with the provisions of section 146, Hill's Code, that the sureties shall give an undertaking "to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful and without sufficient cause," are liable to the defendant, in case of judgment in his favor, for all the costs in the action, and not simply for such expenses as may have been incurred on account of the attachment.—*Drake v. Sworts*, 198.
2. **DISCHARGING ATTACHMENT BY RE-DELIVERY BOND—CODE, § 154.**—The execution and delivery by a defendant in an attachment action of a re-delivery bond, conditional for the return of the property or its value, in case plaintiff shall obtain judgment, as provided for by section 154, Hill's Code, does not dissolve the lien of the attachment, nor is it a waiver of the right of action on the attachment bond. The giving of a bail bond under sections 159 and 160, Hill's Code, will dissolve an attachment, but such is not the effect of a bond under section 154.—*Drake v. Sworts*, 199.
3. **COSTS—LIABILITY OF SURETY ON ATTACHMENT BOND.**—The surety on an attachment bond conditioned for the payment of all costs that may be adjudged to the defendant cannot, when sued on the bond, shew that some of the items included in the judgment for costs were erroneously included therein, since the undertaking binds him to abide the result of the attachment action without being a party thereto.—*Drake v. Sworts*, 199.
4. **JUDGMENT—DECREE—ORDER DISSOLVING ATTACHMENT—CODE, §§ 535, 545.**—An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment, decree, or final order from which an appeal will lie under Hill's Code, § 535.—*Van Voorhies v. Taylor*, 247.

ATTORNEY'S FEES in notes.

See **BILLS AND NOTES**, 1, 2.

ATTORNEYS LIEN.

1. **BAIL MONEY—CODE, § 1014.**—Where money is specially deposited with an attorney to be used as cash bail for a client, and to be returned as soon as that purpose shall be accomplished, the attorney cannot acquire any lien thereon for his services; he is simply a special bailee and responsible as such.—*State v. Lucas*, 168.

BAIL MONEY deposited with an attorney is not subject to a lien for his services.—*State v. Lucas*, 168.

BENEFIT OF DECREE.

Acceptance of the Benefit of a Judgment or Decree as Constituting a Waiver of the Right to Appeal. See **APPEAL**, 1.

BILL OF EXCEPTIONS.

APPEAL—ERROR NOT NOTED.—It is an invariable rule in Oregon that no objection to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal unless there was an objection, a ruling thereon, and an exception, all properly incorporated into a bill of exceptions.—*State v. Foot You*, 61.

See also **EXCEPTIONS**.

BILLS AND NOTES.

1. **STIPULATION FOR ATTORNEY'S FEE—NEGOTIABILITY.**—A stipulation in a note for the payment of a reasonable attorney's fee in case of suit or action thereon does not destroy its negotiability.—*Benn v. Kutzschan*, 28.
2. **IDEM—LIABILITY OF INDORSER.**—An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit, is as much liable for the attorney's fee as for the principal of the note.—*Benn v. Kutzschan*, 28.
3. **PROMISSORY NOTE—FICTITIOUS PAYEE.**—One who has furnished the actual consideration for, and is the holder of, a promissory note in terms payable to another, may treat such other person as a fictitious payee, and sue thereon as upon a note payable to bearer.—*Assignment of Pendleton Hardware Co.* 330.
4. **BILLS AND NOTES—SET-OFF—DEFENSES TO NOTES TRANSFERRED AFTER MATURITY.**—One who takes negotiable paper after maturity takes it subject not only to equities inherent in the paper, but subject also to all payments, or set-offs in the nature of payments, that may have attached to it in the hands of prior holders.—*McDonald v. Mackenzie*, 573.
5. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Where both members of a partnership agree with the maker of a promissory note due to one of them that the amount of such note may be applied to the payment of a demand by such holder against the firm, but the note is assigned after maturity to another person, instead of being cancelled, the one may be offset against the other.—*McDonald v. Mackenzie*, 573.
6. **DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.**—Where one has obtained a decree upon a note and mortgage, which was subject to a counterclaim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.—*McDonald v. Mackenzie*, 573.

BOARD OF EQUALIZATION.

1. **WRIT OF REVIEW—INFERIOR TRIBUNALS—PRESUMPTION OF REGULARITY.**—The proceedings of a board of equalization, after it has acquired jurisdiction over a taxpayer, will not be set aside on writ of review because the record does not contain the evidence on which its findings of fact were based, unless it affirmatively appears in the record that the evidence was insufficient to sustain them. This is in pursuance of the rule that when inferior tribunals have once acquired jurisdiction every presumption exists in favor of the regularity of their proceedings.—*Becker v. Malheur County*, 217.
2. **TAXATION—POWER OF COUNTY BOARD OF EQUALIZATION TO ASSESS PROPERTY—CODE, § 2779.**—Where an owner of property subject to taxation fails to see that it is listed and properly valued by the assessor, section 2779 of Hill's Code authorizes the board of equalization to put it on the assessment roll, and put a valuation thereon; and it is the duty of the property owner to attend the sittings of the board, and make any objections that he may desire to the assessment, and if he does not he cannot be heard to complain afterward.—*Ramp v. Marion County*, 461.
3. **TAXATION—BOARD OF EQUALIZATION—MORTGAGES—CLASSIFICATION OF REAL PROPERTY—CODE, §§ 2770, 2771, 2778—LAWS, 1891, p. 182, §§ 7, 8.**—Under the provisions of sections 7 and 8 of Sessions Laws, 1891, p. 182, providing that the state board of equalization shall consider real estate and personal property separately in equalizing the value of property in the different counties, and that they shall add to or subtract from the aggregate valuation of the real and several classes of personal property, such per centum in each case as will bring the same to its fair money value; and under the further provisions of sections 2770, 2771, and 2773, dividing real estate into three classes, consisting of (1) city, village, or town property; (2) mortgages, deeds of trust, contracts, or obligations, whereby land is made security for the payment of a debt; and (3) all other real property,

BOARD OF EQUALIZATION—CONCLUDED.

—the power of the state board of equalization is not limited to changing the aggregate valuation of all the three classes of real property, but it may increase or diminish the aggregate valuation of any of the separate classes of real property, as, for example, the aggregate valuation of mortgages, without changing any of the other classes.—*Smith v. Kelly*, 464.

4. **INCREASE BY STATE BOARD OF EQUALIZATION OF ASSESSED VALUATION—CONSTITUTION, ART. IX., § 1.**—If all of one distinct class of property is equally assessed in proportion to its value, the fact that another class may be assessed at a different rate in proportion to its value, is not a violation of the constitutional provision that assessment and taxation must be uniform.—*Smith v. Kelly*, 465.
5. **EVIDENCE.**—The claim that the state board of equalization wilfully and arbitrarily assessed mortgages in Multnomah County at a higher per cent than other real property in said county for the year 1892 is not sustained by the evidence.—*Smith v. Kelly*, 465.

BOAT LIENS.

1. **CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS TO ENFORCE A LIEN FOR BUILDING VESSELS—CODE, § 3690.**—Under section 9 of the Judiciary Act of 1789, the district courts of the United States have exclusive jurisdiction of all maritime causes of action, but a contract for furnishing materials in constructing a domestic vessel is not a maritime contract; therefore, section 3690, Hill's Code, is constitutional and valid in so far as it gives the state courts jurisdiction to enforce by a proceeding *in rem* the lien given by the state law for materials used in constructing domestic vessels, nor is it of any consequence that all or part of the materials were furnished after the vessel was launched.—*The Victorian*, 121.
2. **STATUTE OF LIMITATIONS—BOAT LIENS—ACCOUNTS—CODE, § 3706.**—Where materials are furnished from time to time as they are needed in the construction of a vessel, and several payments are made on account, all the items constitute one continuous account, and the limitation of one year provided by section 3706, Hill's Code, for enforcing a lien for such materials, does not begin to run against each item as it was furnished, but begins from the date of the last item.—*The Victorian*, 121.
3. **BOAT LIEN—PAYMENT TO CONTRACTOR.**—Under statutes like section 3690, Hill's Code, providing that every vessel built in the state shall be liable to a lien for all debts due to persons on account of material used in the construction of the same, the right to a lien is determined solely by the furnishing of the material—and this is in no wise affected by the terms of the contract between the owner and contractor, or by the fact that the contractor may have been fully paid.—*The Victorian*, 122.

BONA FIDE PURCHASER.

Quitclaim Deed as Notice of Defects in Title. See DEED, 3.

Land Fraudulently Sold for Taxes—Notice. See NOTICE, 7.

BONDS.

Attachment Bonds—Costs. See ATTACHMENT, 1, 3.

Re-delivery Bonds in Attachments. See ATTACHMENT, 2.

BUILDING CONTRACTS.

SPECIFIC PERFORMANCE—BUILDING CONTRACTS.—Although specific performance of a building contract will rarely be enforced, a contract agreeing to furnish stone of a peculiar kind, color, quality, and texture which cannot be procured elsewhere, to erect the walls, will be so far enforced as to require the contractor to permit the owner to take stone sufficient to erect the building, and to use derricks erected at the quarry for hoisting, necessary to enable such stone

BUILDING CONTRACTS—CONCLUDED.

to be taken out, where a large portion of the building has been erected, the contractor is insolvent and unable to complete his contract, and he has received nearly the whole consideration therefor, and it will be necessary if such stone is not furnished to rebuild the structure, or mar its effect by the use of other stone.—*Rector of St. David's v. Wood*, 396.

BURDEN OF PROOF.

LIBEL AND SLANDER—PRIVILEGED STATEMENTS OF WITNESSES—MALICE.—Statements uttered or published by witnesses in the course of judicial proceedings are presumptively privileged, and before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and were not in response to questions asked by counsel.—*Cooper v. Phipps*, 357.

CANDIDATES FOR OFFICE.

LIBEL—CANDIDATE FOR OFFICE—MALICE—PRIVILEGE.—The fitness and qualification of a candidate for a public office may be subjected to the closest scrutiny and investigation, and charges affecting the fitness of such a candidate will not be actionable without proof of express malice; but when a crime is falsely imputed to a candidate, the utterance is actionable *per se*, the law implying malice. Such charges are in no respect privileged, and can be justified only by proof of their truth.—*Upton v. Hume*, 420.

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CHANGE OF VENUE.

1. **AFFIDAVIT.**—An affidavit for a change of venue need not necessarily state in so many words that the application is not made for the purpose of delay, since that fact may appear from the matters set forth as clearly as from any positive statement to that effect.—*Puckwood v. State*, 261.
2. **POWER OF JUSTICE'S COURTS TO GRANT CHANGES OF VENUE IN CASES OF MISDEMEANOR.**—A justice of the peace has authority to grant a change of venue in cases of misdemeanor. It is true that the Code of Criminal Procedure by which, under section 2131, Hill's Code, the practice in criminal matters before a justice is generally regulated, does not provide for a change of venue in misdemeanors, but section 2078, which does provide for such a change, applies to both civil and criminal cases, and modifies section 2131.—*Puckwood v. State*, 261.

CHARACTER of Plaintiff cannot be shown in Libel and Slander Actions until it has been attacked.—*Cooper v. Phipps*, 387.

CHATTEL MORTGAGES.

1. **INTEREST OF MORTGAGEE.**—In Oregon a chattel mortgage creates more than a mere lien; after condition broken, it gives a right to possession—a qualified ownership of the property mortgaged.—*Marquam v. Sengfelder*, 2.
2. **PLEDGE—EQUITABLE LIEN—MORTGAGE LEASE.**—A stipulation in a lease that "all personal property in said premises, including furniture and household goods of every description, shall be at all times liable for rent of said premises; and in case of the violation of any of the provisions of this lease by the lessee,

CHATTEL MORTGAGES — CONCLUDED.

the lessor may terminate this lease and hold any property found thereon for any arrears of rent or damages," does not create a chattel mortgage, since the title to the property is not transferred; nor does it create a pledge, for possession was not delivered; it creates only an equitable lien. — *Marquam v. Sengfelder*, 2.

3. **EQUITABLE LIEN — FRAUD.** — The same rules that determine the priority and validity of chattel mortgages, apply with equal force and like effect to equitable liens; and therefore, under subdivision 40 of section 776 of Hill's Code, an unrecorded lien created by a lease creates only a presumption of fraud, which may be rebutted. — *Marquam v. Sengfelder*, 2.
4. **DESCRIPTION IN CHATTEL MORTGAGE — "FURNITURE" AND "HOUSEHOLD GOODS" DEFINED.** — In a chattel mortgage, or an equitable lien, a description is sufficient if it will enable third persons to identify the property by inquiry or by location; thus a description of the chattels as "all personal property, including furniture and household goods of every description," is sufficient to create a lien on all personal chattels which may contribute to the use or convenience of the householder, or the ornament of his house, under the description of "furniture," and on every household article of a permanent nature which is not consumed in its enjoyment under the term "household goods"; but it will not cover wines, liquors, or groceries. — *Marquam v. Sengfelder*, 2.
5. **CHATTEL MORTGAGES — PAROL EVIDENCE.** — A description in a chattel mortgage is sufficient, if by the aid of parol proof the particular property may be identified, and such proof is admissible for the purpose of applying the description, though not for enlarging it. — *Sommer v. Island Mercantile Co.*, 214.
6. **CHATTEL MORTGAGE — DESCRIPTION.** — A description of the mortgaged property, in a chattel mortgage, as being a given number of feet of good merchantable lumber, in the yard of a designated company, on a creek named, in a given county, "being piled and ricked thereon in the usual manner, and consisting of general common lumber," — is sufficient. — *Sommer v. Island Mercantile Co.* 214.

CITY ORDINANCES that are required to be published before going into effect must be published for the designated time and in the manner specified or they will be void. — *Grafton v. City of Sellwood*, 118.

CLOSE SEASONS.

GAME AND FISH LAWS. — It is not a violation of the game or fish laws of Oregon (Laws 1891, p. 88, as amended by laws 1898, p. 145) to have in one's possession during a close season, fish caught out of the state, or caught in the state during an open season. — *State v. McGuire*, 366.

COLLATERAL ATTACK.

JURISDICTION OF FOREIGN COURT. — The jurisdiction of a foreign court may always be inquired into, and its judgment collaterally attacked on that ground. — *Foster v. Navier*, 441.

COMPETENCY OF DYING DECLARATIONS. See **CRIMINAL LAW**, § 4, 15.

COMMUTING HOMESTEAD ENTRY by paying money in lieu of time residence does not change the entry into a preëmption. — *Johnson v. Bridal Veil Lumbering Co.* 182.

CODE CITATIONS. See **STATUTES**.

CONDONATION need not be pleaded to be available as a defense in a divorce suit. — *Hill v. Hill*, 416.

CONFIRMATION OF EXECUTION SALES.

1. **EXECUTION SALE — OBJECTIONS — EQUITY.** — An execution debtor who has failed to appear in the original suit and move to quash the execution, or to file objections to the confirmation of the sale, without any other excuse for such failure than absence from the state, is precluded from bringing a suit to set aside such

CONTRACTS—CONTINUED.

action will lie against any county for its proportion of the state tax. The liability of a county for its proportion of the state tax is a "corporate obligation" for which it may be sued under section 2239, Hill's Code. — *State v. Baker Co.* 141.

9. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT FOR PAYMENT FROM PARTICULAR FUND—DAMAGES FOR NEGLIGENCE IN NOT COLLECTING FUND.—A city which makes a contract for a street improvement, containing a stipulation that the contractor will look for pay only to a special fund to be collected and paid into the city treasury for that purpose, and that "he will not compel the city by legal process or otherwise to pay for the improvement out of any other fund," is guilty of such neglect and unreasonable delay as to render it liable in an action for damages at the hands of the holders of warrants issued in payment for such improvements, where it has failed for five years to press to trial an injunction suit restraining the collection of the assessment necessary to make such payment. — *Commercial National Bank v. City of Portland*, 138.
10. INSOLVENT CORPORATIONS—FIDUCIARY RELATION OF DIRECTORS.—The directors of a corporation occupy a fiduciary position, and are bound to act with the utmost fidelity for the interest of the stockholders, or, in case the corporation becomes insolvent, for the interest of the creditors; they cannot deal with the corporate property in their personal capacity, nor make profit out of it. — *Hutchinson v. Bidwell*, 219.
11. *IDEM*.—The directors of an insolvent milling company leased the corporate property to themselves and operated the plant at a profit; *held*, that the directors are liable to account to the creditors of the corporation for the profits under the lease, but neither the wheat bought by the directors to be ground, nor the flour made from such wheat, is liable to attachment as the property of the corporation. — *Hutchinson v. Bidwell*, 219.
12. ASSIGNABILITY OF CONTRACT FOR SUPPORT BETWEEN FATHER AND SON.—FORFEITURE.—Where a son, as a part of the consideration for a deed from his father, agrees to give the latter an annuity, and a home on the land granted, he cannot, without the father's consent, convey the land to another, even if the latter agree to perform the son's covenant, since the obligation of the son is personal; and such a conveyance works a forfeiture of the son's estate. — *Thomas v. Thomas*, 251.
13. VENDOR AND PURCHASER—ABSTRACT OF TITLE.—A purchaser of land under a contract by which the vendor agrees to furnish an abstract "showing a good and clear title free from defects" is entitled to recover back purchase money paid where the abstract furnished does not disclose a good title, although the title tested by the original record and conveyances and other facts not upon the face of the abstract is good and free from defects. — *Kane v. Rippey*, 333.
14. REFORMING OR CANCELLING CONTRACTS—FRAUD.—The fact that one of the parties to a deed or contract was mistaken as to the legal effect of the instrument, or of the terms used, or that one of the parties was ignorant or illiterate, will not justify a reformation or cancellation of the document, but it must also appear that some relation of trust or confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties. — *Archer v. California Lumber Co.* 340.
15. *IDEM*—FRAUD.—A deed executed by an ignorant and illiterate person, in reliance upon the agents for the grantee, to whom he has entrusted the preparation of it, which does not express the real contract made between the parties, will be reformed in equity when it also appears that the grantor believed that the said agent was his attorney, and relied entirely on him to properly prepare the papers. — *Archer v. California Lumber Co.* 340.
16. CONTRACT PAYABLE WHEN SOME FUTURE EVENT SHALL OCCUR.—Where there is a present indebtedness due absolutely, and the happening of some future event

CONTRACTS—CONCLUDED.

- is fixed as a convenient time for payment merely, and such future event does not happen, the debt is payable within a reasonable time.—*Noland v. Bull*, 478.
17. SPECIFIC PERFORMANCE OF CONTRACT TO PURCHASE LAND—EQUITY.—Specific performance to enforce a contract for the purchase of land will be granted at the instance of the venditor when he tenders a deed, since the relief asked is not only the payment of money but the acceptance of the deed.—*Johnston v. Wadsworth*, 494.
 18. CONTRACT TO PURCHASE LAND—MUTUALITY.—An agreement by a vendor upon a proper consideration to repurchase land if the vendee shall so desire, is not void for want of mutuality, where the option is exercised within the time limited. When the option is exercised the minds of the parties meet and the contract becomes mutual.—*Johnston v. Wadsworth*, 494.
 19. CONSIDERATION—SEAL—STATUTE OF FRAUDS—CODE, § 785.—A seal is of itself the expression of a consideration sufficient to satisfy the statute of frauds, requiring an agreement or memorandum for the sale of lands to express the consideration.—*Johnston v. Wadsworth*, 494.
 20. CONTRACT—ACT OF GOD.—Failure to repair leased dams or races within ten days after the water has fallen to the average winter stage as required by a contract leasing the water power, is not excused, if the water continues below that stage, by the fact that the work could not profitably be done within the time agreed upon; but if the water falls below the required stage and immediately rises again and continues above the required depth, the lessor will be released from liability for breach of his covenant, if he makes the repairs as soon as possible.—*Pengra v. Wheeler*, 532.
 21. ACT OF GOD—DEFENSE—PLEADING.—The act of God rendering performance impossible, if relied on as a defense, must be pleaded.—*Pengra v. Wheeler*, 532.
 22. CONTRACTS—LIQUIDATED DAMAGES.—A clause in a lease for a *pro rata* reduction of the agreed rent of a water power in case of a deficiency of water, is not a provision for liquidated damages so as to prevent the lessee from recovering damages for breach by the lessor of another clause in the same lease to repair the dams and races, whereby the lessee loses the use of his mill, the rental value of which is twenty dollars per day, while the rent of the water power is only three dollars per day.—*Pengra v. Wheeler*, 532.
 23. PAROL EVIDENCE TO VARY WRITTEN CONTRACT—CODE, § 692.—In an action to recover money on a note and a written lease, it is not competent for the defendant to prove that at the time the note and lease were made, the plaintiff agreed to take back from the defendant such goods as he might have left, and such hay and grain as might be on the place, at the expiration of the lease, as this would be varying and materially changing by parol evidence the terms of a written agreement, contrary to the provisions of section 692, Hill's Code.—*Hindman v. Edgar*, 581.
 24. *IDEM*.—It is error to instruct a jury that the terms of a written contract can be affected or varied by a contemporaneous verbal agreement between the parties.—*Hindman v. Edgar*, 581.

SPECIFIC PERFORMANCE OF CONTRACTS. See SPECIFIC PERFORMANCE.

CORPORATE OBLIGATION OF COUNTY.

Claim of State for Taxes—Corporate Obligation. See CONTRACTS, 7, 8.

CORPORATIONS. See also MUNICIPAL CORPORATIONS.

1. RESCISSION OF CONTRACT—EQUITY—ULTRA VIRES.—An agreement will not be rescinded at the instance of a corporation as being *ultra vires* and voidable, when the parties have acquiesced therein for more than fifteen years, and large expenditures have been incurred and improvements made upon the faith thereof, and the corporation has received commensurate benefits and been relieved from burdensome obligations.—*Odd Fellows' Association v. Hegele*, 16.

CORPORATIONS — CONTINUED.

2. **ULTRA VIRES.**—Where a corporation organized to buy and hold real estate for the use and occupation of the lodges of a social order, and to generally advance the good of such order, erects a building for the use of the different lodges, and rents the lower part for stores, it has power to grant to another person the use of an alley across the premises in consideration of reciprocal benefits; such a grant is not necessarily *ultra vires* because it deprives the corporation of the exclusive use of all the lot, for it may be essential to the better use and enjoyment of the building.—*Odd Fellows' Association v. Hegele*, 16.
3. **JURISDICTION OF STATE COURTS OVER FOREIGN CORPORATIONS.**—The rules of the common law regarding service on foreign corporations have been much relaxed until it is now generally held that where a corporation is permitted, either by express enactment or by acquiescence, to do business in a state other than the one in which it was created, it is subject to the jurisdiction of the courts of such other state as to all matters founded upon contracts made, or causes of action arising, in such other state, and service may be made upon it in the same manner as upon a domestic corporation, where the law does not provide otherwise; but where a foreign corporation is not engaged in business in such other state, and has neither an agency nor property therein, service of process upon an agent or officer of the corporation who resides in another jurisdiction, and is only casually within the state, will not confer jurisdiction, unless there is a special statute authorizing such service, it being considered that the official character of such officer or agent does not accompany him beyond the limits of the state in which the corporation was created.—*Aldrich v. Anchor Coal Co.* 32.
4. **JURISDICTION OVER FOREIGN CORPORATIONS**—CODE, § 516.—Service of summons within this state on an officer of a foreign corporation who happens to be casually here does not confer on the courts of Oregon jurisdiction over such corporation, since section 516, Hill's Code, provides that no foreign corporation "shall be subject to the jurisdiction of a court of this state, unless it shall appear or have an agency established therein for the transaction of some portion of its business, or have property therein," and making a contract in Oregon to be performed elsewhere, and negotiating in this state a sale of the corporate property, is not transacting corporate business within the meaning of the statute.—*Aldrich v. Anchor Coal Co.* 32.
5. **JURISDICTION TO ENFORCE LIABILITY OF STOCKHOLDERS CREATED BY LAWS OF ANOTHER STATE**—CONFLICT OF LAWS.—When a statute creates a new right and liability against a stockholder in a corporation, and prescribes a peculiar remedy for its enforcement, the creditor is sometimes unable to enforce his rights in any other state than that where the corporation exists, because no other forum can enforce the peculiar remedy; but when the statute simply creates the liability, leaving the creditor to select any common-law remedy that he may consider appropriate, the rights so given may be enforced by a common-law action in any court having jurisdiction of the subject matter and the parties.—*Aldrich v. Anchor Coal Co.* 32.
6. **IDEM — EQUITY.**—The liability of a stockholder in an Oregon corporation to the creditors thereof can be enforced only in equity; but the legal statutory liability of a stockholder in a foreign corporation, which is, by the law of the state where it is created, a contract enforceable at law, may be enforced in Oregon like any other liability arising on a contract made in another state.—*Aldrich v. Anchor Coal Co.* 33.
7. **ASSIGNMENT FOR CREDITORS — ULTRA VIRES.**—The fact that a corporation was not by its articles authorized to deal in a certain kind of property, will not justify it in refusing to pay for the same on the ground that the purchase was *ultra vires*, where there is no special prohibition against the purchase, and the goods are retained. A general assignee is subject to the same duties and obligations as his assignor in this regard, and if he retains the property so purchased he must pay for it.—*Assignment of Pendleton Hardware Co.*, 330.

CORPORATIONS — CONCLUDED.

8. **PROMISSORY NOTE — CLAIM AGAINST ASSIGNEE.** — A note, the execution of which was authorized by a corporation for the purpose of paying another note due by it, and used for that purpose, but which was inadvertently made by its officers without signing the name of the corporation thereto, and was taken up when due by certain of the signers, is a proper claim by such signers against the corporation and its assignee in insolvency. — *Assignment of Pendleton Hardware Co.* 330.
9. **INSOLVENT CORPORATIONS — FIDUCIARY RELATION OF DIRECTORS.** — The directors of a corporation occupy a fiduciary position, and are bound to act with the utmost fidelity for the interest of the stockholders, or, in case the corporation becomes insolvent, for the interest of the creditors; they cannot deal with the corporate property in their personal capacity, nor make a profit out of it. — *Hutchinson v. Bidwell*, 219.

COSTS.

1. **ELECTION CONTESTS.** — Under the rule announced in *Wood v. Fitzgerald*, 3 Or. 568, costs cannot be allowed to the prevailing party in an election contest, but the correctness of that ruling is doubtful. — *Hughes v. Holman*, 1.
2. **TIME FOR FILING OBJECTIONS TO COST BILL.** — Objection to a cost bill should not be entertained after the lapse of five months from the two days limited by section 556, Hill's Code, for filing such objections, unless it is shown that the delay resulted from mistake, inadvertence, surprise, or excusable neglect. — *Hishop v. Moldenhauer*, 106.
3. **VACATING JUDGMENT FOR COSTS.** — CODE, § 102. — A party may, under the liberal language of section 102, Hill's Code, be relieved from a judgment for costs and disbursements entered against him if it shall appear that it was entered through mistake, inadvertence, surprise, or excusable neglect. — *Weiss v. Meyer*, 108.
4. **OBJECTIONS — DISCRETION OF COURT.** — Where the affidavit of the party seeking relief shows that no objections to the bill of costs and disbursements were filed within the time prescribed by law because of the illness of his counsel, there was no abuse of discretion on the part of the trial court in allowing the objections to be filed after the expiration of the statutory time. — *Weiss v. Meyer*, 108.
5. **EXPENSE OF SURVEY OR PLAT.** — The expense of making a survey of land in controversy in a case, or preparing a plat thereof, for the use of one of the parties is not a "disbursement" within the meaning of section 553, Hill's Code. — *Weiss v. Meyer*, 108.
6. **LIABILITY OF SURETIES ON ATTACHMENT BONDS — COSTS.** — CODE, § 146. — The sureties on an undertaking in attachment which complies with the provisions of section 146, Hill's Code, that the sureties shall give an undertaking "to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, if the same be wrongful and without sufficient cause," are liable to the defendant, in case of judgment in his favor, for all the costs in the action, and not simply for such expenses as may have been incurred on account of the attachment. — *Drake v. Sworts*, 198.
7. **COSTS — LIABILITY OF SURETY ON ATTACHMENT BOND.** — The surety on an attachment bond conditioned for the payment of all costs that may be adjudged to the defendant cannot, when sued on the bond, show that some of the items included in the judgment for costs were erroneously included therein, since the undertaking binds him to abide the result of the attachment action without being a party thereto. — *Drake v. Sworts*, 199.
8. **FINDINGS OF FACT — COSTS.** — CODE, § 557. — Under section 557 of Hill's Code it is the duty of the trial court to make findings of fact upon each item of costs in dispute, and this must be done before the appellate court can consider the correctness of the taxation. — *Thomas v. Thomas*, 251.

COSTS — CONCLUDED.

9. **COSTS — DISCRETION OF COURT — CODE, § 554.**—The trial court is invested with a discretion in allowing costs in equity cases, which will not be reviewed except for an abuse thereof.—*Cole v. Logan*, 305.

COUNTIES.

1. **ACTION AGAINST A COUNTY — SECTIONS 850 AND 2239.**—In Oregon the authority to maintain an action against a county on an obligation created by law is not derived from section 350, but exists independently of it; and this section must be construed in connection with section 2239, which subjects a county to a suit or action on account of any matter arising out of its corporate obligations, whether created by contract or otherwise.—*State v. Baker County*, 141.
2. **CLAIM OF STATE FOR TAXES — CORPORATE OBLIGATION OF COUNTY.**—The general scheme of assessing, levying, and collecting state taxes in Oregon creates the relation of debtor and creditor between the state and each county; and, no particular remedy having been provided for enforcing the obligation, a law action will lie against any county for its proportion of the state tax. The liability of a county for its proportion of the state tax is a "corporate obligation" for which it may be sued under section 2239, Hill's Code.—*State v. Baker County*, 141.

COUNTY ROADS.

COUNTY ROADS — NOTICE — JURISDICTION — CODE, § 4063.—Under section 4063, Hill's Code, providing that notice to establish a county road shall be served by posting it in several public places for thirty days, the notice must name with reasonable certainty the time when the notice will be presented, and the fact that actual knowledge of the intended proceeding has come to the knowledge of a person to be affected cannot aid a defective notice. An undated notice is insufficient to confer jurisdiction in a road proceeding.—*Bitting v. Douglas County*, 406.

COURTS.

Collateral Attacks on Jurisdiction of Foreign Courts. See JURISDICTION, 8.

CREDIBILITY.

Of witnesses. See CRIMINAL LAW, 9.

Of Dying Declarations. See CRIMINAL LAW, 4.

CRIMINAL EVIDENCE. See EVIDENCE, 16-26.

CRIMINAL LAW.

1. **HOMICIDE — DYING DECLARATIONS — EVIDENCE.**—On a trial for murder, declarations of the deceased as to the cause of his injury and the identity of the party who inflicted the fatal wound, shown to have been made under a sense of impending death, are admissible in evidence, although testified to in Chinese and translated into English by a sworn interpreter.—*State v. Foot You*, 61.
2. **DYING DECLARATIONS — OPINION EVIDENCE.**—A statement of a person shot, that he caught a glimpse, as he fell, of the person that shot him, and thinks he would know him if he saw him, followed by a statement on the following day, when the defendant was presented to him for identification, that he fully recognizes him as the one who shot him,—is not the expression of an opinion, and is admissible as a dying declaration.—*State v. Foot You*, 12.
3. **COMPETENCY OF DYING DECLARATIONS.**—The test to be applied to dying declarations to determine their admissibility is whether the deceased, if living, would have been permitted to testify to the things contained in the declarations.—*State v. Foot You*, 62.
4. **COMPETENCY AND CREDIBILITY OF DYING DECLARATIONS.**—The competency of dying declarations is for the court; but, after they have been admitted, their weight and credibility are questions of fact for the jury. The facts that decla-

CRIMINAL LAW—CONTINUED.

- rations made by the victim of a murder, under sense of impending death, were the result of questions propounded by an attorney, the absence of cross-examination, the use of an interpreter, the presence of friends and prosecuting officers only, and that accused was unrepresented by counsel, are matters affecting merely the weight and credibility, and not the competency, of such declarations.—*State v. Foot You*, 61.
5. CRIMINAL EVIDENCE.—A conviction of murder will not be reversed because a pistol not connected with defendant was introduced in evidence, where it was admitted only on the understanding that it should be so connected, and was withdrawn from the jury on failure of the state to show such connection.—*State v. Foot You*, 61.
 6. APPEAL—ERROR NOT NOTED—BILL OF EXCEPTIONS.—It is an invariable rule in Oregon that no objection to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal unless there was an objection, a ruling thereon, and an exception, all properly incorporated into a bill of exceptions.—*State v. Foot You*, 61.
 7. APPEAL—ERROR NOT NOTED—PRACTICE.—The fact that the whole record of the trial is before the appellate court upon some particular assignment of error, does not authorize the court to examine such record to see whether any other errors or irregularities than those noted in the conduct of the trial can be found, which, if properly excepted to, would justify a reversal.—*State v. Foot You*, 61.
 8. MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT.—A motion to set aside a verdict, or to grant a new trial, because of insufficiency of the evidence, in both civil and criminal cases, is addressed to the sound discretion of the trial court, and its ruling thereon cannot be assigned as error on appeal.—*State v. Foot You*, 62.
 9. VERDICT—WEIGHT OF TESTIMONY.—The credibility of witnesses and the weight to be given to testimony are matters for the consideration of the jury, and when a verdict has been approved by the trial court, the appellate court will not review it merely on the weight of the testimony.—*State v. Foot You*, 62.
 10. HOMICIDE—HEAT OF PASSION—CODE, § 1727.—A design to kill, formed in the midst of a conflict, when reason is obscured by passion, does not make a homicide murder in the first degree, although the slayer has at the time enough reason and reflection left to enable him to know that he is about to take, and to intend to take, the life of his adversary.—*State v. Henderson*, 100.
 11. RES GESTÆ.—On a trial for murder, a declaration of the deceased, made at the time of and during the affray, is admissible as part of the *res gestæ*.—*State v. Henderson*, 100.
 12. LARCENY BY BAILEE—PAROL EVIDENCE.—In a case of larceny by bailee parol evidence is always admissible to show the real ownership of the property charged to have been stolen.—*State v. Lucas*, 168.
 13. BAIL MONEY—ATTORNEY'S LIEN—CODE, § 1044.—Where money is specially deposited with an attorney to be used as cash bail for a client, and to be returned as soon as that purpose shall be accomplished, the attorney cannot acquire any lien thereon for his services; he is simply a special bailee and responsible as such.—*State v. Lucas*, 168.
 14. JURY TRIAL—REMARKS BY COURT.—A remark by the court that "it does not follow because a woman is lewd that it affects her veracity," when it is attempted to affect the credibility of a witness by showing that she is lewd, is an invasion of the province of the jury, and prejudicial error.—*State v. Lucas*, 168.
 15. DYING DECLARATIONS—EVIDENCE.—To render dying declarations admissible in evidence they must appear to have been made under a sense of impending death and when the deceased had no hope of recovery; but such a belief may be inferred from circumstances, and need not have been expressly stated by the deceased. Within this rule statements made by one in a semi-comatose

CRIMINAL LAW—CONCLUDED.

but conscious condition, suffering from a mortal gunshot wound from which he never rallied, and which speedily proved fatal, who has declared at intervals that he cannot live, and has previously said that he could not, because he was "hurt too bad," are admissible in evidence as dying declarations.—*State v. Fletcher*, 295.

16. **IMPEACHMENT—EVIDENCE—HARMLESS ERROR.**—The exclusion of evidence tending to impeach a witness by showing inconsistent statements at other times, is harmless, where the witness himself admits having made such statements.—*State v. Fletcher*, 295.
17. **EVIDENCE OF EXPERIMENTS.**—The result of experiments with a pistol and some cartridges found on a defendant made for the purpose of showing that a ball from such pistol would penetrate further into the woodwork of the room where deceased was shot than would balls fired from the pistol with which the killing is claimed to have been done, cannot be admitted in evidence unless it is shown that the conditions of position, distance, etc., were the same in both cases.—*State v. Fletcher*, 295.
18. **EVIDENCE—STATEMENTS OF OTHER PERSONS—HEARSAY.**—While it is admissible to show that another person committed the crime with which the defendant is charged, it must be by evidence directly connecting such person with the occurrence itself; but remote acts, disconnected and outside of the crime itself, confessions of others, and the like, are purely hearsay, and are inadmissible. Under this rule evidence is inadmissible on a trial for murder, that another person than defendant had threatened to kill the deceased, and that on the morning after the killing he said that he had killed him, that at the time he had on clothing corresponding to that worn by the murderer as described by witness, and was seen coming from that direction four or five hours after the crime was committed.—*State v. Fletcher*, 295.

CRUELTY.

DIVORCE—EVIDENCE.—Evidence in a suit for divorce that defendant frequently charged plaintiff with unchastity, without stating the times, places, persons, or circumstances, is too indefinite and uncertain to warrant a decree.—*Hull v. Hull*, 416.

CUSTOM AND USAGE.

CUSTOM AND USAGE—EVIDENCE.—In an action to recover the contract price of saw-logs, which were to be "suitable and usual" for defendant's mill, and the "commercial purposes" thereof, it is not error to refuse to allow plaintiffs to cross-examine as to the lengths of logs delivered, in order to show their unsuitableness, meaning of the terms quoted, unless the terms are shown to have a local or peculiar significance, or the witness is qualified to testify on the subject.—*Johnson v. Hamilton*, 870.

DAMAGES.

1. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT FOR PAYMENT FROM PARTICULAR FUND—DAMAGES FOR NEGLIGENCE IN NOT COLLECTING FUND.**—A city which makes a contract for a street improvement, containing a stipulation that the contractor will look for pay only to a special fund to be collected and paid into the city treasury for that purpose, and that "he will not compel the city by legal process or otherwise to pay for the improvement out of any other fund," is guilty of such neglect and unreasonable delay as to render it liable in an action for damages at the hands of the holders of warrants issued in payment for such improvements, where it has failed for five years to press to trial an injunction suit restraining the collection of the assessment necessary to make such payment.—*Commercial National Bank v. City of Portland*, 183.
2. **DAMAGES.**—The question of damage done by cutting the convenient timber to the neglect of the more remote, under a contract for cutting the whole timber, cannot be submitted under an assignment of a breach in cutting the timber on

DAMAGES—CONCLUDED.

the ground cut over, and leaving suitable timber thereon not cut into sawlogs, and cutting and delivering unsound logs.—*Johnson v. Hamilton*, 320.

3. **JUSTIFICATION OF LIBEL—MITIGATION OF DAMAGES.**—The fact that a defamatory publication was copied from another newspaper in the honest belief that it was true, is not a justification, although it may go in mitigation of damages.—*Upton v. Hume*, 420.
4. **LIBEL—EVIDENCE OF OTHER CHARGES—MALICE—DAMAGES.**—In an action for libel, actionable words spoken or published on other occasions than the one charged, can be given in evidence as tending to show express malice and to enhance the damages, when they impute the same crime or are a renewal of the original charge, but not otherwise.—*Upton v. Hume*, 420.
5. **CONTRACTS—LIQUIDATED DAMAGES.**—A clause in a lease for a *pro rata* reduction of the agreed rent of a water power in case of a deficiency of water, is not a provision for liquidated damages so as to prevent the lessee from recovering damages for breach by the lessor of another clause in the same lease to repair the dams and races, whereby the lessee loses the use of his mill, the rental value of which is twenty dollars per day, while the rent of the water power is only three dollars per day.—*Pengra v. Wheeler*, 582.

DECREE.

Appeal cannot be taken from a Judgment or Decree after a Party has once accepted the benefit of it.—*Portland Construction Co. v. O'Neil*, 54.

JUDGMENT—DECREE—ORDER DISSOLVING ATTACHMENT—CODE, §§ 535, 545.—An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment, decree, or final order from which an appeal will lie under Hill's Code, § 535.—*Van Voorhies v. Taylor*, 247.

DEED.

1. **DESCRIPTION OF REAL PROPERTY.**—A description in a deed or agreement is sufficient when it states that the property is situated on a certain island, and is known by a special name, and is more particularly described in certain deeds between parties named which are recorded in certain counties, and that the tract contains a definite number of acres.—*House v. Jackson*, 89.
2. **POSSESSION AS NOTICE OF UNRECORDED DEFEASANCE—CODE**, § 3029.—Continued possession of land by a stranger to the title is sufficient to put a purchaser from a vendor out of possession upon inquiry; but the continued possession by the grantor in an absolute recorded deed is not notice to a *bona fide* purchaser of such grantor's equity under an unrecorded defeasance, within the meaning of section 3029 of Hill's Code.—*Exon v. Dancke*, 110.
3. **QUIT-CLAIM—BONA FIDE PURCHASER.**—One who takes by a quit-claim deed land on which are ditches then being used to divert water to the lands of another, is chargeable with notice of the latter's rights to the water, since the grantee in such a deed is never an innocent purchaser without notice.—*Low v. Schaffer*, 289.

DEFAULT.

1. **NOTICE OF APPEAL TO PARTY IN DEFAULT.**—The fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such party with notice of appeal.—*Moody v. Miller*, 179.
2. **SERVICE OF PROCESS—WRONG NAME.**—Process served on one by a wrong name is as effectually served as though his right name had been used, and jurisdiction is thereby acquired. A default judgment on such a service is good everywhere.—*Foshier v. Narver*, 441.

DEFINITIONS.

See **HOUSEHOLD GOODS; FURNITURE; ADVERSE PARTY.**

DEMURRER.

1. **APPEAL—ANSWER—CODE, § 536.**—An appeal may be taken from a decree rendered against a defendant standing on his demurrer and refusing to answer or plead further after it is overruled, at any time within six months from the date thereof.—*Hendy Machine Works v. Portland Savings Bank*, 60.
2. **MOTION TO STRIKE OUT DEMURRER.**—The proper way to test the sufficiency of a pleading is by a demurrer and not by a motion to strike out.—*The Victorians*, 122.

DESCRIPTION.

In Chattel Mortgage, when sufficient. See **CHattel MORTGAGE**, 4-6.

In Deed or Agreement, when sufficient. See **DEED**, 1.

DIRECTORS of Insolvent Corporations are bound to act with the utmost fidelity to protect the interests entrusted to them.—*Hutchinson v. Bidwell*, 219.

DISBURSEMENTS.

1. **EXPENSE OF SURVEY OR PLAT.**—The expense of making a survey of land in controversy in a case, or preparing a plat thereof, for the use of one of the parties is not a "disbursement" within the meaning of section 553, Hill's Code.—*Weiss v. Meyer*, 108.
2. **COSTS—LIABILITY OF SURETY ON ATTACHMENT BOND.**—The surety on an attachment bond conditioned for the payment of all costs that may be adjudged to the defendant, cannot, when sued on the bond, show that some of the items included in the judgment for costs were erroneously included therein, since the undertaking binds him to abide the result of the attachment action without being a party thereto.—*Drake v. Sworts*, 199.

DISCRETION OF COURT.

1. **MOTION FOR NEW TRIAL.**—A motion to set aside a verdict, or to grant a new trial, because of insufficiency of the evidence, in both civil and criminal cases, is addressed to the sound discretion of the trial court, and its ruling thereon cannot be assigned as error on appeal.—*State v. Foot You*, 62.
2. **FILING OBJECTIONS TO COST BILL.**—Where the affidavit of the party seeking relief shows that no objections to the bill of costs and disbursements were filed within the time prescribed by law because of the illness of his counsel, there was no abuse of discretion on the part of the trial court in allowing the objections to be filed after the expiration of the statutory time.—*Weiss v. Meyer*, 108.
3. **COSTS—DISCRETION OF COURT—CODE, § 554.**—The trial court is invested with a discretion in allowing costs in equity cases, which will not be reviewed except for an abuse thereof.—*Cole v. Logan*, 305.
4. **RELIEF FROM JUDGMENT—CODE, § 102.**—Under Hill's Code, § 102, providing that the court may relieve a party from a judgment taken against him through his mistake, only a plain abuse of discretion in refusing relief will be reviewed.—*Lovejoy v. Willamette Locks Co.* 569.

DISSOLUTION OF PARTNERSHIP.

Arbitration as an Estoppel. See **ARBITRATION**.

Accounting and Receiver. See **RECEIVER**, 1.

DIVERSION OF WATER.

1. **PRIOR APPROPRIATION.**—An appropriation of the waters of a stream for a beneficial use is an appropriation of all tributaries thereto above the point of original diversion, flowing in well-defined channels.—*Low v. Schaffer*, 239.
2. **MOVING POINT OF DIVERSION.**—A prior appropriator of the water of a creek for irrigating purposes cannot move his point of diversion above the dam of a subsequent appropriator, so as to injuriously affect the latter's rights.—*Cole v. Logan*, 305.

DIVORCE.

1. **DIVORCE—EVIDENCE.**—Evidence in a suit for divorce that defendant frequently charged plaintiff with unchastity, without stating the times, places, persons, or circumstances, is too indefinite and uncertain to warrant a decree.—*Hull v. Hull*, 416.
2. **DIVORCE—PLEADING CONDONATION.**—In a divorce suit defendant may take advantage of the defense of condonation without pleading it.—*Hull v. Hull*, 416.
3. **DIVORCE—ADMISSIONS IN PLEADINGS.**—Admissions in an answer in divorce proceedings do not warrant a decree, but plaintiff must establish a good cause of suit independently of them.—*Hull v. Hull*, 416.

DYING DECLARATIONS.

Admissibility. See CRIMINAL LAW, 1, 2, 3, 15.

Competency. See CRIMINAL LAW, 3, 4.

Credibility. See CRIMINAL LAW, 4.

EASEMENTS. See PARTY WALLS, 1, 2.

ELECTRIC WIRES.

1. **NEGLIGENCE.**—It is negligence to allow a wire which, from its environment, is liable to become charged with electricity, to hang in or over a street or sidewalk at such a height as to obstruct and endanger ordinary travel.—*Ahern v. Oregon Telephone Co.* 276.
2. **IDEM.**—A telephone company which, instead of removing its wire on taking it out of a residence, leaves it hanging upon an electric-light company's pole, is bound to look after it, and is liable for an injury to a traveler who comes in contact with it after it has been removed by employees of the electric-light company and hung upon a telephone pole, where it is accidentally touched by a traveler on a sidewalk while it was charged by contact with an electric-light wire or a street railway company's wire.—*Ahern v. Oregon Telephone Co.* 276.

EQUITABLE LIENS.

1. **LIEN OF CHATTEL MORTGAGE—INTEREST OF MORTGAGEE.**—In Oregon a chattel mortgage creates more than a mere lien; after condition broken, it gives a right to possession—a qualified ownership of the property mortgaged.—*Marquam v. Sengfelder*, 2.
2. **CHATTEL MORTGAGE—PLEDGE—EQUITABLE LIEN—MORTGAGE LEASE.**—A stipulation in a lease that "All personal property in said premises, including furniture and household goods of every description, shall be at all times liable for rent of said premises; and in case of the violation of any of the provisions of this lease by the lessee, the lessor may terminate this lease and hold any property found thereon for any arrears of rent or damages," does not create a chattel mortgage, since the title to the property is not transferred; nor does it create a pledge, for possession was not delivered; it creates only an equitable lien.—*Marquam v. Sengfelder*, 2.
3. **EQUITABLE LIEN—FRAUD.**—The same rules that determine the priority and validity of chattel mortgages, apply with equal force and like effect to equitable liens; and therefore, under subdivision 40 of section 776 of Hill's Code, an unrecorded lien created by a lease creates only a presumption of fraud, which may be rebutted.—*Marquam v. Sengfelder*, 2.
4. **DESCRIPTION IN CHATTEL MORTGAGE SUFFICIENT TO CREATE LIEN.**—In a chattel mortgage, or an equitable lien, a description is sufficient if it will enable third persons to identify the property by inquiry or by location; thus a description of the chattels as "all personal property, including furniture and household goods of every description," is sufficient to create a lien on all personal chattels which may contribute to the use or convenience of the householder, or the ornament of his house, under the description of "furniture," and on every household article of a permanent nature which is not consumed in its

EQUITABLE LIENS—CONCLUDED.

enjoyment under the term "household goods"; but it will not cover wines, liquors, or groceries.—*Marquam v. Sengfelder*, 2.

EQUITY.

1. **RESCISSION OF CONTRACT—ULTRA VIRES.**—An agreement will not be rescinded at the instance of a corporation as being *ultra vires* and voidable, when the parties have acquiesced therein for more than fifteen years, and large expenditures have been incurred and improvements made on the strength thereof, and the corporation has received commensurate benefits and been relieved from burdensome obligations.—*Odd Fellows' Association v. Hegele*, 16.
2. **CORPORATIONS—ULTRA VIRES.**—Where a corporation organized to buy and hold real estate for the use and occupation of the lodges of a social order, and to generally advance the good of such order, erects a building for the use of the different lodges, and rents the lower part for stores, it has power to grant to another person the use of an ally across the premises in consideration of reciprocal benefits; such a grant is not necessarily *ultra vires* because it deprives the corporation of the exclusive use of all the lot, for it may be essential to the better use and enjoyment of the building.—*Odd Fellows' Association v. Hegele*, 16.
3. **JURISDICTION—LIABILITY OF STOCKHOLDERS.**—The liability of a stockholder in an Oregon corporation to the creditors thereof can be enforced only in equity; but the statutory liability of a stockholder in a foreign corporation, which is, by the law of the state where it is created, a contract enforceable at law, may be enforced in Oregon like any other liability arising on a contract made in another state.—*Aldrich v. Anchor Coal Co.* 33.
4. **POSSESSION OF REAL PROPERTY AS NOTICE TO PURCHASER.**—It is a general rule that open, notorious, and exclusive possession and occupation of land by a stranger to the title is sufficient to put a purchaser from a vendor who is out of possession upon inquiry as to the legal and equitable rights of the party in possession.—*Exon v. Dancke*, 110.
5. **DEED ABSOLUTE—NOTICE OF UNRECORDED DEFEASANCE.**—Continued possession of land by the grantor in an absolute recorded deed thereof is not notice to a *bona fide* purchaser from the grantee in the deed of the grantor's equity under an unrecorded defeasance, within the meaning of section 3029, Hill's Code.—*Exon v. Dancke*, 110.
6. **ASSIGNABILITY OF CONTRACT FOR SUPPORT BETWEEN FATHER AND SON.—FORFEITURE.**—Where a son, as a part of the consideration for a deed from his father, agrees to give the latter an annuity, and a home on the land granted, he cannot, without the father's consent, convey the land to another, even if the latter agree to perform the son's covenant, since the obligation of the son is personal; and such a conveyance works a forfeiture of the son's estate.—*Thomas v. Thomas*, 261.
7. **REFORMING OR CANCELLING CONTRACTS—FRAUD.**—The fact that one of the parties to a deed or contract was mistaken as to the legal effect of the instrument, or of the terms used, or that one of the parties was ignorant and illiterate, will not justify a reformation or cancellation of the document, but it must also appear that some relation of trust or confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties.—*Archer v. California Lumber Co.* 340.
8. **IDEM—FRAUD.**—A deed executed by an ignorant and illiterate person, in reliance upon the agents for the grantee, to whom he has entrusted the preparation of it, which does not express the real contract made between the parties, will be reformed in equity when it also appears that the grantor believed that the said agent was his attorney, and relied entirely on him to properly prepare the papers.—*Archer v. California Lumber Co.* 340.

EQUITY—CONCLUDED.

9. **EVIDENCE NECESSARY TO REFORM A WRITTEN INSTRUMENT.**—One who seeks to have a deed reformed on the ground that it was procured by fraud must establish his case by a clear preponderance of the evidence, but it need not be so conclusive as to leave no room for doubt.—*Archer v. California Lumber Co.* 841.
10. **MECHANICS' LIEN—LAW AND EQUITY.**—Under the provisions of the Oregon law retaining the distinction between suits in equity and actions at law, though abolishing the difference in the forms, a complaint for the foreclosure of a mechanics' lien which does not state a cause of suit, cannot be retained and treated as an action at law to recover money.—*Ming Yue v. Coos Bay Railroad Company*, 392.
11. **EXECUTION SALE—OBJECTIONS TO CONFIRMATION—EQUITY.**—An execution debtor who has failed to appear in the original suit and move to quash the execution, or to file objections to the confirmation of the sale, without any other excuse for such failure than absence from the state, is precluded from bringing a suit to set aside such sale on the ground of inadequate price and irregularities subsequent to the decree.—*Leinenweber v. Brown*, 548.
12. **DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.**—Where one has obtained a decree upon a note and mortgage, which was subject to a counterclaim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.—*McDonald v. Mackenzie*, 573.
13. **EQUITY—REFORMATION OF NOTE—FRAUD.**—Plaintiff purchased from defendant a bond for a deed of land, and at the time of the sale defendant, who had the bond in his possession, stated that there was six hundred dollars, "maybe a little more or a little less," due thereon, supposing such to be the case, but without pretending to have actual knowledge on the subject. For several weeks prior to executing the note in payment therefor, plaintiff had the bond in his possession, but made no attempt to ascertain the actual amount due thereon, though he had the data necessary to the calculation. *Held*, that he was not entitled to a reformation of the note, though the amount due on the bond was three hundred dollars more than the amount stated by the defendant.—*Banfield v. Banfield*, 571.

Jurisdiction of Equity in Cases of Specific Performance. See **SPECIFIC PERFORMANCE**.

ESTATES OF DECEDENTS.

Rejected Claim—Sufficiency of Evidence. See **PROBATE PRACTICE**, 1.

Claim against Estate—Statute of Limitations. See **PROBATE PRACTICE**, 2.

ESTOPPEL.

1. **ARBITRATION AND AWARD—AUTHORITY OF ARBITRATORS.**—An award, to be effective as a bar to a subsequent suit over the same matters, should follow the terms of the submission, it should cover everything submitted, but nothing more; though in case the award does cover matters not within the terms of the arbitration agreement, the excess will be separated, if possible, and the award upheld as to the part that is good.—*Garrow v. Nicolai*, 76.
2. **ARBITRATION AND AWARD—ESTOPPEL.**—An award will not operate as a bar to an action wherein there appear other facts and issues not contemplated in the original submission or included in the award.—*Garrow v. Nicolai*, 77.
3. **ESTOPPEL.**—One who advises another to purchase property without mentioning a vendor's lien which he claims thereon, is estopped from asserting it after the negotiations are completed, and the consideration paid.—*Jones v. Gates*, 411.
4. **LANDLORD AND TENANT—ESTOPPEL.**—A tenant is not estopped from asserting that since his entry into possession, the lessor's title has expired by his conveyance of the property to another.—*Westshore Mills Co. v. Edwards*, 475.

ESTOPPEL—CONCLUDED.

5. **PLEADING ESTOPPEL.**—It is now the settled rule in Oregon that an estoppel in pais must be pleaded to be available as a defense.—*Bruce v. Phoenix Insurance Co.* 486.
6. **STREET IMPROVEMENTS—ESTOPPEL.**—Property owners who have had notice and an opportunity to be heard in regard to an assessment for a public improvement, will not be granted relief in a court of equity against such assessment as unequal and unjust, where they fail to appear and make their objection at the proper time. They are estopped by their own conduct from alleging any irregularities in the proceedings; and will be heard only to show that proceedings are totally void.—*Wilson v. City of Salem*, 504.

EVIDENCE.

I. CIVIL EVIDENCE.

II. CRIMINAL EVIDENCE.

I. CIVIL EVIDENCE.

1. **EVIDENCE OF FRAUD.**—The mere fact that when an officer went to the debtor's store for the purpose of levying an attachment, the debtor requested him not to close it, does not necessarily prove that any secret trust existed between the debtor and another to whom he had previously given a chattel mortgage on his stock of goods, even though the debtor was in failing circumstances; nor does the fact that after an officer had executed an attachment on a debtor's stock of goods, another creditor to whom the debtor had given a chattel mortgage thereon consented that the debtor's employes might take some of the attached property in payment of the amount due them, does not, of itself, show an intent by the creditor to protect the debtor, where he gave such consent under advice that the debtor's employes were preferred creditors.
2. **REJECTED CLAIM—SUFFICIENCY OF EVIDENCE—CODE, § 1134.**—Where, in an action by a daughter against her father's executor to establish a rejected claim against his estate, she introduces in evidence a power of attorney from her to her father to sell certain real estate and to manage the proceeds thereof, and a deed showing such sale by him for a designated amount nearly twenty years before, and testifies herself that he had sent her only a few dollars, she has made out a sufficient case under Hill's Code, § 1134, providing that no rejected claim shall be allowed except upon competent evidence other than the testimony of the claimant.—*Quinn v. Gross*, 147.
3. **PRINCIPAL AND AGENT—STATUTE OF LIMITATIONS.**—In an action by a principal to recover money collected by an agent, it is sufficient to show the agency, the collection of the money, and that the principal had no knowledge of this until within the statutory period of limitation; there need not have been any affirmative act of concealment by the agent: it is sufficient that the principal did not know of the collection.—*Quinn v. Gross*, 147.
4. **CHATTEL MORTGAGES—PAROL EVIDENCE.**—A description in a chattel mortgage is sufficient, if by the aid of parol proof the particular property may be identified, and such proof is admissible for the purpose of applying the description, though not for enlarging it.—*Sommer v. Island Mercantile Co.* 214.
5. **DECLARATIONS AS TO TITLE.**—Statements made by one in possession of land in assertion of his own title, are inadmissible against another claiming title thereto, if made in the latter's absence.—*Low v. Schaffer*, 239.
6. **LEDGER ENTRIES AS EVIDENCE** are inadmissible without supporting proof from the original entries, unless they are admitted without objection.—*Durkheimer v. Heiner*, 270.
7. **CUSTOM AND USAGE.**—In an action to recover the contract price of sawlogs, which were to be "suitable and usual" for defendant's mill, and the "commercial purposes" thereof, it is not error to refuse to allow plaintiffs to cross-examine as to the lengths of logs delivered, in order to show their unsuit-

EVIDENCE—CONTINUED.

ableness, meaning of the terms quoted, unless the terms are shown to have a local or peculiar significance, or the witness is qualified to testify on the subject.—*Johnson v. Hamilton*, 320.

8. **EVIDENCE.**—In an action to recover the contract price for cutting sawlogs, a written notice by the defendant of a rescission of the contract given after the action was commenced, cannot be admitted on the ground that it explained the plaintiff's failure to put the logs already cut on the railway, where the notice does not in terms forbid this, and the plaintiffs have testified that the defendant requested them to put them on, and they refused to do so unless the notice was rescinded.—*Johnson v. Hamilton*, 320.

9. **PAYMENTS.**—The withdrawal from the consideration of the jury of all testimony in regard to payments not made directly on a contract in suit, is reversible error where money was due for former work at the time the contract was entered into, and the payments were made on account without special reference to such former work or to the work done under the contract, as this was virtually withdrawing from the jury all evidence of payment and left them no basis on which to compute the amount remaining due on the contract.—*Johnson v. Hamilton*, 320.

10. **EVIDENCE NECESSARY TO REFORM A WRITTEN INSTRUMENT.**—One who seeks to have a deed reformed on the ground that it was procured by fraud must establish his case by a clear preponderance of the evidence, but it need not be so conclusive as to leave no room for doubt.—*Archer v. California Lumber Co.* 342.

11. **LIBEL AND SLANDER—EVIDENCE OF PLAINTIFF'S CHARACTER.**—In actions for libel and slander, the good character of the plaintiff cannot be shown until it has been attacked.—*Cooper v. Phipps*, 357.

12. **DIVORCE—CRUELTY.**—Evidence in a suit for divorce that defendant frequently charged plaintiff with unchastity, without stating the times, places, persons, or circumstances, is too indefinite and uncertain to warrant a decree.—*Hill v. Hill*, 416.

13. **AUTHORITY OF PARTNER—EVIDENCE OF RATIFICATION.**—The fact that a firm took possession of property that one of the partnership had purchased tends to show his authority to bind the firm, or, at least, their ratification of his acts.—*Dugan v. Mcervie*, 523.

14. **PAROL EVIDENCE TO VARY WRITTEN CONTRACT—CODE, § 692.**—In an action to recover money on a note and a written lease, it is not competent for the defendant to prove that at the time the note and lease were made, the plaintiff agreed to take back from the defendant such goods as he might have left, and such hay and grain as might be on the place, at the expiration of the lease, as this would be varying and materially changing by parol evidence the terms of a written agreement, contrary to the provisions of section 692, Hill's Code.—*Hindman v. Edgar*, 581.

15. **IDEM.**—It is error to instruct a jury that the terms of a written contract can be affected or varied by a contemporaneous verbal agreement between the parties.—*Hindman v. Edgar*, 581.

II. CRIMINAL EVIDENCE.

16. **DYING DECLARATIONS AS EVIDENCE.**—On a trial for murder, declarations of the deceased as to the cause of his injury and the identity of the party who inflicted the fatal wound, shown to have been made under a sense of impending death, are admissible in evidence, although testified to in Chinese and translated into English by a sworn interpreter.—*State v. Foot You*, 61.

17. **DYING DECLARATIONS—OPINION EVIDENCE.**—A statement of a person shot, that he caught a glimpse, as he fell, of the person that shot him, and thinks he would know him if he saw him, followed by a statement on the following day, when the defendant was presented to him for identification, that he fully rec-

EVIDENCE—CONCLUDED.

- ognizes him as the one who shot him,—is not the expression of an opinion, and is admissible as a dying declaration.—*State v. Foot You*, 62.
18. **COMPETENCY OF DYING DECLARATIONS.**—The test to be applied to dying declarations to determine their admissibility is whether the deceased, if living, would have been permitted to testify to the things contained in the declarations.—*State v. Foot You*, 62.
19. **CRIMINAL EVIDENCE.**—A conviction of murder will not be reversed because a pistol not connected with defendant was introduced in evidence, where it was admitted only on the understanding that it should be so connected, and was withdrawn from the jury on failure of the state to show such connection.—*State v. Foot You*, 61.
20. **MOTION FOR NEW TRIAL—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT.**—A motion to set aside a verdict, or to grant a new trial, because of insufficiency of the evidence, in both civil and criminal cases, is addressed to the sound discretion of the trial court, and its ruling thereon cannot be assigned as error on appeal.—*State v. Foot You*, 62.
21. **RES GESTÆ.**—On a trial for murder, a declaration of the deceased, made at the time of and during the affray, is admissible as part of the *res gestæ*.—*State v. Henderson*, 100.
22. **LARCENY BY BAILEE—PAROL EVIDENCE.**—In a case of larceny by bailee parol evidence is always admissible to show the real ownership of the property charged to have been stolen.—*State v. Lucas*, 168.
23. **DYING DECLARATIONS—EVIDENCE.**—To render dying declarations admissible in evidence they must appear to have been made under a sense of impending death and when the deceased had no hope of recovery; but such a belief may be inferred from circumstances, and need not have been expressly stated by the deceased. Within this rule statements made by one in a semi-comatose but conscious condition, suffering from a mortal gunshot wound from which he never rallied, and which speedily proved fatal, who has declared at intervals that he cannot live, and has previously said that he could not, because he was "hurt too bad," are admissible in evidence as dying declarations.—*State v. Fletcher*, 296.
24. **IMPEACHMENT—EVIDENCE—HARMLESS ERROR.**—The exclusion of evidence tending to impeach a witness by showing inconsistent statements at other times, is harmless, where the witness himself admits having made such statements.—*State v. Fletcher*, 296.
25. **EVIDENCE OF EXPERIMENTS.**—The result of experiments with a pistol and some cartridges found on a defendant made for the purpose of showing that a ball from such pistol would penetrate further into the woodwork of the room where deceased was shot than would balls fired from the pistol with which the killing is claimed to have been done, cannot be admitted in evidence unless it is shown that the conditions of position, distance, etc., were the same in both cases.—*State v. Fletcher*, 296.
26. **EVIDENCE—STATEMENTS OF OTHER PERSONS—HEARSAY.**—While it is admissible to show that another person committed the crime with which the defendant is charged, it must be by evidence directly connecting such person with the occurrence itself; but remote acts, disconnected and outside of the crime itself, confessions of others, and the like, are purely hearsay, and are inadmissible. Under this rule evidence is inadmissible on a trial for murder, that another person than defendant had threatened to kill the deceased, and that on the morning after the killing he said that he had killed him, that at the time he had on clothing corresponding to that worn by the murderer as described by a witness, and was seen coming from that direction four or five hours after the crime was committed.—*State v. Fletcher*, 296.

EXCEPTIONS.

1. Exceptions must be saved at the trial to secure the consideration of a question in the appellate court.—*State v. Foot You*, 61.
2. APPEAL—SERIES OF INSTRUCTIONS.—An exception to a series of instructions is sufficient to secure their consideration on appeal, where they in effect assert but one proposition of law.—*Nickum v. Gaston*, 330.
3. GENERAL EXCEPTION TO INSTRUCTIONS.—A general exception to an instruction is sufficient, when it is challenged on the ground that it is not the law as applied to the facts of the case.—*Nickum v. Gaston*, 381.

EXCUSABLE NEGLECT as a ground for vacating a judgment for costs.—*Weiss v. Meyer*, 108.

EXECUTORS.

REJECTED CLAIM—SUFFICIENCY OF EVIDENCE—CODE, § 1134.—Where, in an action by a daughter against her father's executor to establish a rejected claim against his estate, she introduces in evidence a power of attorney from her to her father to sell certain real estate and to manage the proceeds thereof, and a deed showing such sale by him for a designated amount nearly twenty years before, and testifies herself that he had sent her only a few dollars, she has made out a sufficient case under Hill's Code, § 1134, providing that no rejected claim shall be allowed except upon competent evidence other than the testimony of the claimant.—*Quinn v. Gross*, 147.

EXECUTION SALES.

1. OBJECTIONS TO CONFIRMATION—EQUITY.—An execution debtor who has failed to appear in the original suit and move to quash the execution, or to file objections to the confirmation of the sale, without any other excuse for such failure than absence from the state, is precluded from bringing a suit to set aside such sale on the ground of inadequate price and irregularities subsequent to the decree.—*Leinenweber v. Brown*, 548.
2. IRREGULARITIES—CONFIRMATION.—An order confirming an execution sale of real property is a conclusive determination of the regularity of the proceedings under the execution.—*Leinenweber v. Brown*, 548.
3. DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.—Where one has obtained a decree upon a note and mortgage, which was subject to a counter-claim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.—*McDonald v. Mackenzie*, 573.

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EVIDENCE OF EXPERIMENTS.—The result of experiments with a pistol and some cartridges found on a defendant made for the purpose of showing that a ball from such pistol would penetrate further into the woodwork of the room where deceased was shot than would balls fired from the pistol with which the killing is claimed to have been done, cannot be admitted in evidence unless it is shown that the conditions of position, distance, etc., were the same in both cases.—*State v. Fletcher*, 295.

FICTITIOUS PAYEE.

PROMISSORY NOTE—FICTITIOUS PAYEE.—One who has furnished the actual consideration for, and is the holder of, a promissory note in terms payable to another, may treat such other person as a fictitious payee, and sue thereon as upon a note payable to bearer.—*Assignment of Pendleton Hardware Co.* 330.

FILING TRANSCRIPT.

APPEAL—FAILURE TO FILE TRANSCRIPT—SECOND APPEAL.—When a party has perfected an appeal, but failed to file the transcript within the time limited by law, the right of appeal is lost unless the supreme or circuit court shall
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FILING TRANSCRIPT—CONCLUDED.

make an order extending the time for filing the transcript; and a second appeal cannot be taken.—*Nestucca Wagon Road Co. v. Landingham*, 439.

FINAL ORDER.

ORDER DISSOLVING ATTACHMENT—CODE, § 535, 545.—An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment decree, or final order from which an appeal will lie under Hill's Code, § 535.—*Van Voorhies v. Taylor*, 247.

FINDINGS OF FACT.

1. **TAXATION OF COSTS**—CODE, § 557.—Under section 557 of Hill's Code it is the duty of the trial court to make findings of fact upon each item of costs in dispute, and this must be done before the appellate court can consider the correctness of the taxation.—*Thomas v. Thomas*, 251.
2. **APPEAL AND ERROR—ADDITIONAL FINDINGS OF FACT—PRACTICE**.—Failure of the trial court to make findings of fact on material issues will not be considered on appeal unless the lower court was asked to make such findings and refused.—*Noland v. Bull*, 479.
3. **TRIAL**.—When a cause is tried by the court without the intervention of a jury, there should be findings of fact upon all the material issues presented by the pleadings. *Drainage District v. Crow*, 20 Or. 585, cited and approved.—*Pengra v. Wheeler*, 532.

FISH LAWS. See CLOSE SEASON.**FOREIGN CORPORATIONS.**

Jurisdiction of State Courts over. See CORPORATIONS, 3, 4.

Jurisdiction to enforce Liability of Stockholders created by Statute of Another State. See CORPORATIONS, 5.

Jurisdiction to enforce Liability of Stockholders created by Statutes of Oregon is in Equity only. See CORPORATIONS, 6.

FOREIGN COURT.

COLLATERAL ATTACK ON JURISDICTION OF FOREIGN COURT.—The jurisdiction of a foreign court may always be inquired into, and its judgment collaterally attacked on that ground.—*Foshier v. Narver*, 441.

FOREIGN JUDGMENT.

FOREIGN JUDGMENT—JURISDICTION.—In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court—the question of liability on the original case is not involved.—*Foshier v. Narver*, 441.

FORFEITURE OF LAND GRANTS.

Public Lands—Title by Relation. See LAND GRANTS, 1.

FRAUD AND FRAUDULENT CONVEYANCES.

1. **AN EQUITABLE LIEN CREATED BY A LEASE** is only presumptively fraudulent, and testimony may be received to rebut such presumption.—*Marquam v. Sengfelder*, 2.
2. **FRAUDULENT CONVEYANCE—PREFERRING CREDITORS**.—A debtor, even in failing circumstances, may prefer a creditor, and may appropriate his property to the satisfaction of such creditor's claim; nor is it material that the creditor knew his debtor's financial condition.—*Marquam v. Sengfelder*, 2.
3. **EVIDENCE OF FRAUD**.—The mere fact that when an officer went to the debtor's store for the purpose of levying an attachment, the debtor requested him not to close it, does not necessarily prove that any secret trust existed between the debtor and another to whom he had previously given a chattel mortgage on his stock of goods, even though the debtor was in failing circumstances; nor

FRAUD AND FRAUDULENT CONVEYANCES—CONCLUDED.

does the fact that after an officer had executed an attachment on a debtor's stock of goods, another creditor to whom the debtor had given a chattel mortgage thereon consented that the debtor's employees might take some of the attached property in payment of the amount due them, does not, of itself, show an intent by the creditor to protect the debtor, where he gave such consent under advice that the debtor's employees were preferred creditors.—*Marquam v. Sengfelder*, 2.

5. REFORMING OR CANCELLING CONTRACTS—FRAUD.—The fact that one of the parties to a deed or contract was mistaken as to the legal effect of the instrument, or of the terms used, or that one of the parties was ignorant and illiterate, will not justify a reformation or cancellation of the document, but it must also appear that some relation of trust or confidence existed between the parties, or that there was fraud or misrepresentation, or that the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties.—*Archer v. California Lumber Co.* 340.
6. *IDEM*—FRAUD.—A deed executed by an ignorant and illiterate person, in reliance upon the agents for the grantee, to whom he has entrusted the preparation of it, which does not express the real contract made between the parties, will be reformed in equity when it also appears that the grantor believed that the said agent was his attorney, and relied entirely on him to properly prepare the papers.—*Archer v. California Lumber Co.* 341.
7. STATUTE OF LIMITATIONS ON TAX SALES—PURCHASE BY OWNER—FRAUD—CODE, § 2840.—Where an owner in possession of land fraudulently permits it to be sold for taxes in order to cut off a prior lien, and buys in such tax title, either directly or indirectly, the limitation of three years provided by section 2840, Hill's Code, does not apply to actions for the recovery of such property by a prior lien-holder.—*Nickum v. Gaston*, 380.
8. EQUITY—REFORMATION OF NOTE—FRAUD.—Plaintiff purchased from defendant a bond for a deed of land, and at the time of the sale defendant, who had the bond in his possession, stated that there was six hundred dollars, "maybe a little more or a little less," due thereon, supposing such to be the case, but without pretending to have actual knowledge on the subject. For several weeks prior to executing the note in payment therefor, plaintiff had the bond in his possession, but made no attempt to ascertain the actual amount due thereon, though he had the data necessary to the calculation. *Held*, that he was not entitled to a reformation of the note, though the amount due on the bond was three hundred dollars more than the amount stated by the defendant.—*Banfield v. Banfield*, 571.

FREEDOM OF THE PRESS.

LIBEL—PRIVILEGE OF NEWSPAPER PUBLISHERS—FREEDOM OF THE PRESS.—The idea that the "freedom of the press," guaranteed by the constitution, gives newspaper proprietors a privilege to publish with impunity charges for which others would be held responsible, is a very erroneous one; such persons have no more immunity from liability for libelous publications than other citizens. The publisher of a false and defamatory charge must always answer in damages to the injured party.—*Upton v. Hume*, 420.

FRIVOLOUS PLEADING.

FRIVOLOUS PLEADING.—The test of frivolousness in pleading is whether or not it introvertibly so appears from the mere reading of it; if so, then it is frivolous, but if argument is required to show that the pleading is bad, it is not frivolous.—*The Victorian*, 121.

FURNITURE.

1. DESCRIPTION IN CHATTEL MORTGAGE.—A description of property in a mortgage as "Furniture" will create a lien on all personal chattels which contribute to

FURNITURE—CONCLUDED.

the use or convenience of the householder, or the ornament of his house.—*Marquam v. Sengfelder*, 2.

GAME LAWS.

CLOSE SEASONS.—It is not a violation of the game or fish laws of Oregon (Laws 1891, p. 33, as amended by laws 1893, p. 145) to have in one's possession during a close season, fish caught out of the state, or caught in the state during an open season.—*State v. McGuire*, 366.

HARMLESS ERROR.

1. **IMPEACHMENT—EVIDENCE—HARMLESS ERROR.**—The exclusion of evidence tending to impeach a witness by showing inconsistent statements at other times, is harmless, where the witness himself admits having made such statements.—*State v. Fletcher*, 295.
2. **PRESUMPTION OF HARMLESS ERROR.**—When prejudicial error affirmatively appears on the face of the record, the appellate court cannot presume that it was harmless; the matter rendering it harmless should appear in the bill of exceptions.—*Nickum v. Gaston*, 381.

HAZARDS OF EMPLOYMENT.

Risks Assumed by Servants. See **MASTER AND SERVANT**.

HEARSAY EVIDENCE. See **CRIMINAL LAW**, 18.**HEAT OF PASSION.**

HOMICIDE—HEAT OF PASSION—CODE, § 1727.—A design to kill, formed in the midst of a conflict, when reason is obscured by passion, does not make a homicide murder in the first degree, although the slayer has at the time enough reason and reflection left to enable him to know that he is about to take, and to intend to take, the life of his adversary.—*State v. Henderson*, 100.

HIGHWAYS. See **COUNTY ROAD**.**HOMESTEAD ENTRY.**

1. **PUBLIC LANDS—HOMESTEAD—TIMBER LAND.**—The fact that a tract of land is such as might be acquired under the Timber Act (20 U. S. Stat. 89), does not preclude anyone from acquiring title thereto under the homestead laws, if entry is made before anyone applies to purchase under the former act.—*Johnson v. Bridal Veil Lumbering Co.* 182.
2. **PUBLIC LANDS—CONCLUSIVENESS OF DECISION OF LOCAL LAND OFFICERS.**—The approval by local officers of final proof of a homestead entry which has been commuted, and the receipt and acknowledgment of the money therefor, is conclusive, in the absence of any allegation of fraud, that the land was of such character as could be acquired under the homestead laws of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.
3. **COMMUTING HOMESTEAD ENTRY—PRE-EMPTION.**—The commuting of a homestead entry, under U. S. Rev. Stat. § 2301, by paying money in lieu of the time settlement, does not change the entry into a pre-emption.—*Johnson v. Bridal Veil Lumbering Co.* 182.

HOMICIDE.

Competency and Credibility of Dying Declarations. See **CRIMINAL LAW**, 3, 4, 15.

Evidence of Dying Declarations. See **CRIMINAL LAW**, 1, 2, 4, 15.

Heat of Passion. See **CRIMINAL LAW**, 10.

HOUSEHOLD GOODS.

DESCRIPTION IN CHATTEL MORTGAGE.—A description of property in a chattel mortgage as "household goods of every description" will create a lien on every

HOUSEHOLD GOODS—CONCLUDED.

household article of a permanent nature that is not consumed in its enjoyment; but it will not cover wines, liquors, or groceries.—*Marquam v. Sengfelder*, 2.

IMPEACHMENT. See HARMLESS ERROR.

INDEBTEDNESS OF COUNTY. See COUNTIES, 2.

INDORSER.

LIABILITY FOR ATTORNEY'S FEES.—An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit, is as much liable for the attorney's fee as for the principal of the note.—*Benn v. Kutschon*, 28.

INFERIOR TRIBUNALS are presumed to have acted regularly when once they have acquired jurisdiction.—*Becker v. Malheur County*, 317.

INJUNCTION.

1. MINING CLAIM—TRESPASS AND WASTE.—To the general rule that equity will not grant an injunction in cases of trespass, there is an established exception in favor of mines, where injunctions will be granted to prevent the substance of the estate from being injured or carried away; and such a suit may be maintained by one in possession as a locator, under Rev. Stat. U. S. §§ 2319-2325, without first establishing, or attempting to establish, his title at law.—*Allen v. Dunlap*, 229.
2. TENDER OF TAX.—Equity will not interfere by injunction to restrain the collection of a tax unless it is unauthorized, or, if authorized, is assessed upon property not subject to taxation, or the persons imposing it were without authority in the premises, or they have proceeded fraudulently; nor will it interfere in any case until plaintiff has tendered the amount of tax that can be shown to be due. Particularly is this true where the complaint discloses the value of the property, and the rate of taxation, so that the legal tax is a mere matter of computation.—*Welch v. Clatsop County*, 452.
3. SUIT BY PRIVATE CITIZEN—TAXATION.—A private individual cannot bring an action in his own name to enjoin the location of a public institution at a different place from that designated by law, without alleging that his property will thereby be subjected to an additional burden of taxation, or that he will sustain some other special injury.—*Sherman v. Bellows*, 553.
4. EQUITY—DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.—Where one has obtained a decree upon a note and mortgage, which was subject to a counterclaim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.—*McDonald v. Mackenzie*, 573.

INJURY TO EMPLOYEE. See MASTER AND SERVANT.

INSANE DELUSIONS.

1. WILLS—INSANE DELUSIONS.—A delusion is a belief that has no reasonable basis in fact, and where there are any facts or circumstances that would or might lead the testator to entertain the particular belief that he does, such belief is not a delusion.—*In re Cline's Will*, 175.
2. IDEM.—A determination by a testator to disinherit certain children because they were witnesses for their mother in a divorce suit against him, and had sympathized with her in the proceeding, is not an insane delusion rendering him unfit to make a will. However erroneous may have been his beliefs about the children, and their feelings toward him, there was still a basis of fact for them, and such beliefs are not delusions.—*In re Cline's Will*, 175.

INSOLVENT CORPORATIONS.

1. INSOLVENT ESTATES—PRESENTATION OF CLAIMS.—In presenting claims against insolvent estates no special form of pleading is required—it is enough to show

INSOLVENT CORPORATIONS—CONCLUDED.

an indebtedness from the insolvent, and, if questioned, the particulars of it can be shown.—*Assignment of Pendleton Hardware Co.* 330.

2. CORPORATIONS—PROMISSORY NOTE—CLAIM AGAINST ASSIGNER.—A note, the execution of which was authorized by a corporation for the purpose of paying another note due by it, and used for that purpose, but which was inadvertently made by its officers without signing the name of the corporation thereto, and was taken up when due by certain of the signers, is a proper claim by such signers against the corporation and its assignee in insolvency.—*Assignment of Pendleton Hardware Co.* 330.

Fiduciary Position of Directors. See CORPORATIONS, 9.

INSTRUCTIONS TO JURIES.

General Exceptions—Exception to Series of Instructions. See EXCEPTIONS, 2, 3.

INSURANCE.

1. WAIVING PROOFS OF LOSS.—A policy-holder who fails to make proof of loss within the time specified therefor in the policy of insurance, cannot recover upon the policy unless such proofs have been waived by the company.—*Bruce v. Phoenix Insurance Co.* 486.
2. POLICY—BREACH OF CONDITION.—A provision of a policy of insurance that the building shall be occupied as a residence, and that if it becomes vacant for ten days the policy shall be void, is binding upon the insured, and allowing the building to be vacant for more than the specified time will prevent recovery.—*Bruce v. Phoenix Insurance Co.* 486.

INTEREST.

1. INTEREST ON UNLIQUIDATED ACCOUNTS—CODE, § 3587.—Where the amount of an account is unliquidated, and there is no express agreement to pay interest, there is no default in payment, and of course no interest, until the amount of the debt is made certain; thus, where a lease of a water power provides for the payment of a fixed sum quarterly, unless the supply of water be deficient, when there should be a proportionate reduction of rent, and in fact the water did partially fail, no interest can be allowed on unpaid installments of rent.—*Pengra v. Wheeler*, 582.
2. MUTUAL ACCOUNTS—INTEREST—CODE, § 3587.—Where a person owes for rent, and furnishes goods and makes repairs against his rent account, there is a case of mutual accounts, and no interest can be allowed either party until the difference between the opposing accounts has been adjusted and settled.—*Pengra v. Wheeler*, 582.
3. IDEM.—Accounts purchased from third parties are not mutual accounts so as to prevent the running of interest upon them, under Hill's Code, § 3587, providing for interest on accounts from the day the balance is ascertained.—*Pengra v. Wheeler*, 582.
4. VERDICT.—Failure to fix a rate of interest in a verdict awarding damages with interest thereon from a given date, does not invalidate it as interest in such case must be computed according to the rate provided by law.—*Duxon v. Mcarvue*, 523.
5. REMITTING PART OF VERDICT—INTEREST.—Error allowing interest in a verdict for a longer period than is proper is not reversible error where the excess of interest has been remitted.—*Duxon v. Mcarvue*, 523.

IRRIGATION. See APPROPRIATION OF WATER.

JOURNAL ENTRY.

APPEAL.—The recitals of a journal entry as to the day on which a judgment was rendered cannot be contradicted in the supreme court by a certified memorandum kept by the clerk of the trial court.—*Histop v. Moldenhauer*, 101.

JUDGMENTS.

1. Acceptance of benefit of judgment or decree as waiving the right to appeal. See *APPEAL*, 1.
2. **VACATING JUDGMENT FOR COSTS.**—CODE, § 102.—A party may, under the liberal language of section 102, Hill's Code, be relieved from a judgment for costs and disbursements entered against him if it shall appear that it was entered through mistake, inadvertence, surprise, or excusable neglect.—*Weiss v. Meyer*, 108.
3. Order dissolving attachment is not a judgment, decree, or final order from which an appeal will lie, under section 535, Hill's Code, until after a judgment has been rendered in the main action.—*Van Voorhels v. Taylor*, 247.
4. **SERVICE OF PROCESS UNDER WRONG NAME.**—Process served on one by a wrong name is as effectually served as though his right name had been used, and jurisdiction is thereby acquired. A default judgment on such a service is good everywhere.—*Foshier v. Narver*, 441.
5. **FOREIGN JUDGMENT—JURISDICTION.**—In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court—the question of liability on the original case is not involved.—*Foshier v. Narver*, 441.
6. **DISCRETION OF COURT—CODE, § 102.**—Under Hill's Code, § 102, providing that the court may relieve a party from a judgment taken against him through his mistake, only a plain abuse of discretion in refusing relief will be reviewed.—*Lovejoy v. Willamette Locks Co.* 569.

JURISDICTION.

1. **JURISDICTION OF STATE COURTS OVER FOREIGN CORPORATIONS.**—The rules of the common law regarding service on foreign corporations have been much relaxed until it is now generally held that where a corporation is permitted, either by express enactment or by acquiescence, to do business in a state other than the one in which it was created, it is subject to the jurisdiction of the courts of such other state as to all matters founded upon contracts made, or causes of action arising, in such other state, and service may be made upon it in the same manner as upon a domestic corporation, where the law does not provide otherwise; but where a foreign corporation is not engaged in business in such other state, and has neither an agency nor property therein, service of process upon an agent or officer of the corporation who resides in another jurisdiction, and is only casually within the state, will not confer jurisdiction, unless there is a special statute authorizing such service, it being considered that the official character of such officer or agent does not accompany him beyond the limits of the state in which the corporation was created.—*Aldrich v. Anchor Coal Co.* 82.
2. **JURISDICTION OVER FOREIGN CORPORATIONS—CODE, § 516.**—Service of summons within this state on an officer of a foreign corporation who happens to be casually here does not confer on the courts of Oregon jurisdiction over such corporation, since section 516, Hill's Code, provides that no foreign corporation "shall be subject to the jurisdiction of a court of this state, unless it shall appear or have an agency established therein for the transaction of some portion of its business, or have property therein," and making a contract in Oregon to be performed elsewhere, and negotiating in this state a sale of the corporate property, is not transacting corporate business within the meaning of the statute.—*Aldrich v. Anchor Coal Co.* 82.
3. **JURISDICTION TO ENFORCE LIABILITY OF STOCKHOLDERS CREATED BY LAWS OF ANOTHER STATE—CONFLICT OF LAWS.**—When a statute creates a new right and liability against a stockholder in a corporation, and prescribes a peculiar remedy for its enforcement, the creditor is sometimes unable to enforce his rights in any other state than that where the corporation exists, because no other forum can enforce the peculiar remedy; but when the statute simply creates the liability, leaving the creditor to select any common-law remedy

JURISDICTION—CONCLUDED

that he may consider appropriate, the rights so given may be enforced by a common-law action in any court having jurisdiction of the subject matter and the parties.—*Aldrich v. Anchor Coal Co.* 32.

- **IDEM—EQUITY.**—The liability of a stockholder in an Oregon corporation to the creditors thereof can be enforced only in equity; but the legal statutory liability of a stockholder in a foreign corporation, which is, by the law of the state where it is created, a contract enforceable at law, may be enforced in Oregon like any other liability arising on a contract made in another state.—*Aldrich v. Anchor Coal Co.* 33.
5. **CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS TO ENFORCE A LIEN FOR BUILDING VESSELS—CODE, § 3690.**—Under section 9 of the Judiciary Act of 1789, the district courts of the United States have exclusive jurisdiction of all maritime causes of action, but a contract for furnishing materials in constructing a domestic vessel is not a maritime contract; therefore, section 3690, Hill's Code, is constitutional and valid in so far as it gives the state courts jurisdiction to enforce by a proceeding *in rem* the lien given by the state law for materials used in constructing domestic vessels, nor is it of any consequence that all or part of the materials were furnished after the vessel was launched.—*The Victorian*, 121.
6. **MINES—JURISDICTION OF JUSTICE'S COURT—CODE, §§ 2175-2183.**—The locator of a quartz mine under the laws of the United States (Rev. Stat. § 2319, *et seq.*) has simply a possessory, but not a legal, estate therein, and may therefore maintain in a justice's court, under sections 2175-2183, Hill's Code, an action for the recovery of such possession, since the title to real estate is not in question.—*Duffy v. Miz*, 265.
7. **COUNTY ROADS—NOTICE—JURISDICTION—CODE, § 4063.**—Under section 4063, Hill's Code, providing that notice to establish a county road shall be served by posting it in several public places for thirty days, the notice must name with reasonable certainty the time when the notice will be presented, and the fact that actual knowledge of the intended proceeding has come to the knowledge of a person to be affected cannot aid a defective notice. An undated notice is insufficient to confer jurisdiction in a road proceeding.—*Bitting v. Douglas County*, 406.
8. **FOREIGN JUDGMENT—EVIDENCE.**—In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court—the question of liability on the original case is not involved.—*Foshier v. Narver*, 441.
9. **COLLATERAL ATTACK ON JURISDICTION OF FOREIGN COURT.**—The jurisdiction of a foreign court may always be inquired into, and its judgment collaterally attacked on that ground.—*Foshier v. Narver*, 441.
10. **MECHANICS' LIENS—LAW AND EQUITY.**—Under the provisions of the Oregon law retaining the distinction between suits in equity and actions at law, though abolishing the difference in the forms, a complaint for the foreclosure of a mechanic's lien, which does not state a cause of suit, cannot be retained and treated as an action at law to recover money.—*Ming Yue v. Coos Bay Railroad Co.* 392.

JURY TRIAL.

REMARKS BY COURT.—A remark by the court that "it does not follow because a woman is lewd that it affects her veracity," when it is attempted to affect the credibility of a witness by showing that she is lewd, is an invasion of the province of the jury, and prejudicial error.—*Stats v. Lucas*, 168.

JUSTICE'S COURTS.

1. **POWER OF JUSTICE'S COURTS TO GRANT CHANGES OF VENUE IN CASES OF MISDEMEANOR.**—A justice of the peace has authority to grant a change of venue in

JUSTICE'S COURTS—CONCLUDED.

cases of misdemeanor. It is true that the Code of Criminal Procedure by which, under section 2131, Hill's Code, the practice in criminal matters before a justice is generally regulated, does not provide for a change of venue in misdemeanors, but section 2078, which does provide for such a change, applies to both civil and criminal cases, and modifies section 2131.—*Packwood v. State*, 261.

2. MINES—JURISDICTION OF JUSTICE'S COURT—CODE, §§ 2175-2183.—The location of a quartz mine under the laws of the United States (Rev. Stat. § 2319, *et seq.*) has simply a possessory, but not a legal, estate therein, and may therefore maintain in a justice's court, under sections 2175-2183, Hill's Code, an action for the recovery of such possession, since the title to real estate is not in question.—*Duffy v. Mix*, 265.

JUSTIFICATION OF LIBEL.

1. JUSTIFICATION OF LIBEL.—MITIGATION OF DAMAGES.—The fact that a defamatory publication was copied from another newspaper in the honest belief that it was true, is not a justification, although it may go in mitigation of damages.—*Upton v. Hume*, 420.
2. FAILURE TO PROVE TRUTH OF LIBELOUS CHARGE—JUSTIFICATION—MALICE—CODE, § 91.—The fact that a defendant in a libel action has failed to prove his plea of the truth of the charge, is not necessarily to be considered as evidence of malice and in aggravation of damages; it is for the jury to decide from all the evidence, and from the spirit of the defense, whether the plea was an honest one, or was simply an excuse to repeat the original charge.—*Upton v. Hume*, 420.

KNOWLEDGE.

NOTICE—PUBLIC WRITINGS.—Knowledge of a fact is always notice thereof, provided such knowledge be such as to prompt a reasonably prudent man to make inquiry which, when prosecuted, would lead him to discover the fact by which he would be affected. Idle rumors and vague suspicions are not enough, nor are general assertions made by strangers, or hearsay statements. Public writings, of course, are always notice, whether seen by the person to be affected or not.—*Jones v. Gates*, 411.

LAND GRANTS.

PUBLIC LANDS—FORFEITURE—TITLE BY RELATION.—One who at the time of the forfeiture of the Northern Pacific Land Grant by the Act of Congress of September 29, 1890, was an actual settler on such grant, and who, within six months after the passage of that act, made claim to his tract under the homestead law, will be considered as an actual settler from the date when he actually settled on the tract; and a railroad company cannot, at any time subsequent to such actual settlement, locate its right of way over such settler's land under the act of Congress of March 3, 1875, granting rights of way over the public lands of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—CONVEYANCE OF LEASED PREMISES—ASSIGNMENT OF RENT.—An owner or lessor of premises who conveys them without reservation of the rent, has no claim to the rent subsequently accruing, unless such rent has been assigned to him by the grantee.—*West Shore Mills Co. v. Edwards*, 475.
2. LANDLORD AND TENANT—ESTOPPEL.—A tenant is not estopped from asserting that since his entry into possession, the lessor's title has expired by his conveyance of the property to another.—*Westshore Mills Co. v. Edwards*, 475.
3. LIABILITY OF LANDLORD FOR PROPERTY LEFT BY OUTGOING TENANT.—A landlord is not liable as a purchaser for property left on the leased premises by the outgoing tenant, and which the landlord never accepted.

LAND OFFICERS.

Conclusiveness of Decision by Local Land Officers. See PUBLIC LANDS, 2.

LARCENY BY BAILEE.

LARCENY BY BAILEE—PAROL EVIDENCE.—In a case of larceny by bailee parol evidence is always admissible to show the real ownership of the property charged to have been stolen.—*State v. Lucas*, 168.

LATIN MAXIMS. See MAXIMS.

LEASES.

MORTGAGE LEASE—EQUITABLE LIEN.—A stipulation in a lease that "all personal property in said premises * * * shall be at all times liable for rent of said premises" * * * creates only an equitable lien, which will be governed by the same rules that determine the validity and priority of chattel mortgages.—*Marquam v. Sengfelder*, 2.

LEDGER ENTRIES are not admissible in evidence without supporting proof from the original entries, unless they are admitted without objection.—*Durkheimer v. Hellner*, 270.

LEGISLATIVE INTENT.

REPEAL OF STATUTE.—It is a general rule that the repeal of a special tax law destroys the remedy for enforcing the collection of the tax, unless the remedy be reserved; but when a tax system is revised and the former law repealed, the legislative intent is presumed to be of prospective force only, and prior valid assessments will not be affected.—*Smith v. Kelly*, 465.

LIBEL AND SLANDER.

1. LIBEL AND SLANDER.—EVIDENCE OF PLAINTIFF'S CHARACTER.—In actions for libel and slander, the good character of the plaintiff cannot be shown until it has been attacked.—*Cooper v. Phipps*, 357.
2. PRIVILEGED STATEMENTS OF WITNESSES—MALICE—BURDEN OF PROOF.—Statements uttered or published by witnesses in the course of judicial proceedings are presumptively privileged, and before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and were not in response to questions asked by counsel.—*Cooper v. Phipps*, 357.
3. LIBEL—CANDIDATE FOR OFFICE—MALICE—PRIVILEGE.—The fitness and qualification of a candidate for a public office may be subjected to the closest scrutiny and investigation, and charges affecting the fitness of such a candidate will not be actionable without proof of express malice; but when a crime is falsely imputed to a candidate, the utterance is actionable *per se*, the law implying malice. Such charges are in no respect privileged, and can be justified only by proof of their truth.—*Upton v. Hume*, 420.
4. PRIVILEGE OF NEWSPAPER PUBLISHERS—FREEDOM OF THE PRESS.—The idea that the "freedom of the press," guaranteed by the constitution, gives newspaper proprietors a privilege to publish with impunity charges for which others would be held responsible, is a very erroneous one; such persons have no more immunity from liability for libelous publications than other citizens. The publisher of a false and defamatory charge must always answer in damages to the injured party.—*Upton v. Hume*, 420.
5. JUSTIFICATION OF LIBEL—MITIGATION OF DAMAGES.—The fact that a defamatory publication was copied from another newspaper in the honest belief that it was true is not a justification, although it may go in mitigation of damages.—*Upton v. Hume*, 420.
6. EVIDENCE OF OTHER CHARGES—MALICE—DAMAGES.—In an action for libel, actionable words spoken or published on other occasions than the one charged,

LIBEL AND SLANDER—CONCLUDED.

can be given in evidence as tending to show express malice and to enhance the damages, when they impute the same crime or are a renewal of the original charge, but not otherwise.—*Upton v. Hume*, 420.

7. **FAILURE TO PROVE TRUTH OF LIBELIOUS CHARGE—JUSTIFICATION—MALICE—CODE, § 91.**—The fact that a defendant in a libel action has failed to prove his plea of the truth of the charge, is not necessarily to be considered as evidence of malice and in aggravation of damages; it is for the jury to decide from all the evidence, and from the spirit of the defense, whether the plea was an honest one, or was simply an excuse to repeat the original charge.—*Upton v. Hume*, 420.

LIENS.

Attorneys Lien. See **BAIL MONEY**.

Boat Liens. See **BOAT LIENS**.

Chattel Mortgage Liens. See **CHATTEL MORTGAGES**.

Equitable Lien Created by a Lease. See **EQUITABLE LIENS**.

Mechanic's Liens. See **MECHANIC'S LIENS**.

Prior Liens not affected by Fraudulent Tax Sale. See **VENDOR AND PURCHASER**.

LIMITATION OF ACTIONS.

To recover on Account for Material used in construction of a Boat. See **STATUTE OF LIMITATIONS**, 1.

By State to recover Taxes from a County. See **STATUTE OF LIMITATIONS**, 2.

By Principal against an Agent. See **STATUTE OF LIMITATIONS**, 3, 4.

To recover Land sold under Tax Sale fraudulently allowed by Owner. See **STATUTE OF LIMITATIONS**, 5.

Against Non-Residents. See **STATUTE OF LIMITATIONS**, 6.

LIQUIDATED DAMAGES. See DAMAGES, 5.**LOCAL IMPROVEMENTS.**

Omission to Assess part of Property Benefited. See **MUNICIPAL CORPORATIONS**, 3, 4.

Neglect of City to Collect Fund to Pay for Improvements. See **MUNICIPAL CORPORATIONS**, 5.

LOCAL LAND OFFICERS.

PUBLIC LANDS—CONCLUSIVENESS OF DECISION OF LOCAL LAND OFFICERS.—The approval by local officers of final proof of a homestead entry which has been commuted, and the receipt and acknowledgment of the money therefor, is conclusive, in the absence of any allegation of fraud, that the land was of such character as could be acquired under the homestead laws of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.

LOCATING COUNTY ROADS.

Notice Necessary to Confer Jurisdiction. See **NOTICE**, 3.

LOCATION OF MINING CLAIM.

Wording of Notice, and Posting Notice. See **MINES**, 2, 3.

MALICE.

1. **SLANDER—PRIVILEGED STATEMENTS OF WITNESSES—BURDEN OF PROOF.**—Statements uttered or published by witnesses in the course of judicial proceedings are presumptively privileged, and before a witness can be held liable in a civil action this presumption must be overcome by showing affirmatively that such

MALICE — CONCLUDED.

statements were not only false and malicious, but that they were not pertinent to the issues, and were not in response to questions asked by counsel.—*Cooper v. Phipps*, 357.

2. **LIBEL — CANDIDATE FOR OFFICE — PRIVILEGE** — The fitness and qualification of a candidate for a public office may be subjected to the closest scrutiny and investigation, and charges affecting the fitness of such a candidate will not be actionable without proof of express malice; but when a crime is falsely imputed to a candidate, the utterance is actionable *per se*, the law implying malice. Such charges are in no respect privileged, and can be justified only by proof of their truth.—*Upton v. Hume*, 420.
3. **LIBEL — EVIDENCE OF OTHER CHARGES — DAMAGES.**—In an action for libel, actionable words spoken or published on other occasions than the one charged, can be given in evidence as tending to show express malice and to enhance the damages, when they impute the same crime, or are a renewal of the original charge, but not otherwise.—*Upton v. Hume*, 420.
4. **FAILURE TO PROVE TRUTH OF LIBELOUS CHARGE — JUSTIFICATION — CODE, § 91.**—The fact that a defendant in a libel action has failed to prove his plea of the truth of the charge, is not necessarily to be considered as evidence of malice and in aggravation of damages; it is for the jury to decide from all the evidence, and from the spirit of the defense, whether the plea was an honest one, or was simply an excuse to repeat the original charge.—*Upton v. Hume*, 420.

MARRIAGE AND DIVORCE.

Pleading Condonation — Admissions in Pleadings. See **DIVORCE**.

MASTER AND SERVANT.

MASTER AND SERVANT — ASSUMING RISK.—A servant assumes not only the risks ordinarily incident to his employment, but also such increased risks as he knowingly and voluntarily undertakes. Under this rule a servant who was employed with others in piling ties in a box car, blocking them as piled, but ceases to block them upon the direction of the foreman to hurry up, and the pile of ties falls on him, cannot recover, as the increased risk from not blocking the pile was evident, and he must be considered to have assumed it.—*Brown v. Oregon Lumber Co.* 315.

MECHANIC'S LIENS.

1. **NOTICE COVERING SEVERAL BUILDINGS AND LOTS — HILL'S CODE, §§ 3669, 3670, 3673.**—One who, under a single contract for a stipulated sum, has performed work on, or has furnished material which was indiscriminately used in, the construction of several houses situated on adjoining lots, owned by one person, is entitled to a lien on all the houses and lots jointly, and may include them all in one notice. This is as true where each house is separate from the others, as where they are all under one roof, the test being the entirety of contract.—*Shea v. Willamette Mills Co.* 40.
2. **DESCRIPTION IN NOTICE — VARIANCE.**—A notice of lien must correctly describe the property on which the lien is claimed. No lien can be enforced on lots in "Carter's Addition to Portland" when the notice described the property as lots in "Market Street Addition to Portland,"—there is a fatal variance between the claim and the proof.—*Hendy Machine Works v. Pacific Cable Co.* 182.
3. **JURISDICTION.**—Under the provisions of the Oregon law retaining the distinction between suits in equity and actions at law, though abolishing the difference in the forms, a complaint for the foreclosure of a mechanics' lien, which does not state a cause of suit, cannot be retained and treated as an action at law to recover money.—*Ming Yue v. Coos Bay R. R. Co.* 392.
4. **NOTICE — NAME OF OWNER — CODE, § 3673.**—A lien which reads "I, R., have, by virtue of a contract made with H., with K. and L., his contractors, furnished material and done work in plastering" a certain house, states the name of the

MECHANIC'S LIENS—CONCLUDED.

person to whom the material was furnished, since the statute makes the contractor the agent of the owner, and the meaning of the sentence can readily be made apparent by transposing some of its words.—*Rowland v. Harmon*, 529.

5. **NOTICE—STATEMENT OF DEMAND.**—The fact that a claim of lien does not contain a true statement of the claimants' demand will not destroy the lien where the inaccuracy was neither wilful nor negligent, and there is an honest dispute about the amount that was really due.—*Rowland v. Harmon*, 529.

MINES AND MINING CLAIMS.

1. **MINING CLAIM—INJUNCTION—TRESPASS AND WASTE.**—To the general rule that equity will not grant an injunction in cases of trespass, there is an established exception in favor of mines, where injunctions will be granted to prevent the substance of the estate from being injured or carried away; and such a suit may be maintained by one in possession as a locator, under Rev. Stat. U. S. §§ 2319, 2325, without first establishing, or attempting to establish, his title at law.—*Allen v. Dunlap*, 229.
2. **MINES—NOTICE OF LOCATION.**—Posting a notice of location at the discovery shaft of a mine, and marking the boundaries of the claim by blazing the trees, squaring stumps, and driving stakes, is a sufficient compliance with the Rev. Stat. U. S. § 2324, providing that the location must be distinctly marked on the ground so that its boundaries can be readily traced.—*Allen v. Dunlap*, 229.
3. **MINING CLAIM—NOTICE OF LOCATION.**—A notice of location of a mining claim alleging the location of one thousand five hundred linear feet, commencing at the notice, and running seven hundred and fifty feet in a southwesterly direction, and seven hundred and fifty feet in a northeasterly direction, with three hundred feet on each side, is not open to the construction of being seven hundred and fifty feet in one direction, and then back to the starting point.—*Allen v. Dunlap*, 229.
4. **MINES—JURISDICTION OF JUSTICE'S COURT—CODE, §§ 2175-2183.**—The locator of a quartz mine under the laws of the United States (Rev. Stat. § 2319, *et seq.*) has simply a possessory, but not a legal, estate therein, and may therefore maintain in a justice's court, under sections 2175-2183, Hill's Code, an action for the recovery of such possession, since the title to real estate is not in question.—*Duffy v. Mitz*, 235.

MISDEMEANORS.

Justice's Court may grant Change of Venue in Such Cases. See **CHANGE OF VENUE**, 2.

MORTGAGES.

1. **MORTGAGE AS SECURITY—ASSIGNMENT OF DEBT.**—It is a familiar principle that where a debt is secured by a mortgage, the former is the principal and the latter an incident thereto, and that an assignment of the debt is an assignment of the mortgage, particularly where the debt is evidenced by a negotiable promissory note. Where such a note, secured by a mortgage, has been assigned by endorsement, the security is protected in the hands of a *bona fide* holder to the same extent as the note itself, unless there be a law requiring assignments of mortgage to be recorded.—*Bamberger v. Geiser*, 203.
2. **DISCHARGE OF MORTGAGE BY MORTGAGEE OR TRANSFEREE.**—A mortgagee or his transferee after assigning a negotiable note secured by a mortgage, has no power to enter of record a satisfaction of such mortgage; such an entry is wholly void and affords neither protection nor priority to a subsequent purchaser or mortgagee, even though the latter acted in perfect good faith without notice of the assignment, and relying upon the recorded release, where there is no law requiring assignments of mortgages to be recorded.—*Bamberger v. Geiser*, 203.
3. **RECORDING ASSIGNMENT OF MORTGAGE—CODE, §§ 3030 AND 3031.**—In Oregon there is no obligation resting upon an assignee of a mortgage to record his transfer

MORTGAGES—CONCLUDED.

in order to protect himself against subsequent purchasers or mortgagees; sections 3030 and 3031, Hill's Code, impliedly permit such an instrument to be recorded when it is in the form of a conveyance, but it is optional with the transferee. Where the assignment of the mortgage is by an endorsement, or some memorandum not having the form of a conveyance, it cannot be recorded at all under existing laws.—*Bamberger v. Geiser*, 204.

MORTGAGE LEASE. See **CHATTEL MORTGAGES**, 2.

MOTION FOR NEW TRIAL is always addressed to the discretion of the trial court, and the granting or refusing such a motion is not a ground for appeal in Oregon.—*State v. Foot You*, 62.

MOTION TO SET ASIDE A VERDICT is always addressed to the discretion of the court, and its ruling thereon is not reviewable in Oregon.—*State v. Foot You*, 62.

MOTION TO STRIKE OUT is not the proper way to test the sufficiency of a pleading, that should be done by a demurrer.—*The Victorian*, 122.

MUNICIPAL CORPORATIONS.

1. **CONTRACT WITH MUNICIPAL CORPORATION.**—When the mode of procedure regarding a contract with a municipal corporation is especially and plainly prescribed and limited, that mode is exclusive and must be pursued, or the contract will be void.—*Grafton v. City of Sellwood*, 118.
2. **PUBLICATION OF ORDINANCES.**—When ordinances are required to be published before they shall go into effect, this requirement is essential and the publication must be in the designated mode.—*Grafton v. City of Sellwood*, 118.
3. **MUNICIPAL ASSESSMENTS—LOCAL IMPROVEMENTS.**—A wilful, arbitrary, and intentional omission on the part of a city council to assess a portion of the property benefited by a local improvement, placing the whole burden upon the remaining property, renders the assessment void, even though the direct benefits to the separate parcels are in excess of the assessment thereon.—*Masters v. City of Portland*, 161.
4. **CONSTITUTIONAL LAW—EQUAL TAXATION—STREET AND SEWER ASSESSMENTS.**—The provision of section 1 of article IX. of the state constitution, requiring a uniform and equal rate of assessment and taxation, does not apply to street or sewer assessments, and an assessment for these purposes in proportion to the benefits received is constitutional.—*Masters v. City of Portland*, 161.
5. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—CONTRACT FOR PAYMENT FROM PARTICULAR FUND—DAMAGES FOR NEGLIGENCE IN NOT COLLECTING FUND.**—A city which makes a contract for a street improvement, containing a stipulation that the contractor will look for pay only to a special fund to be collected and paid into the city treasury for that purpose, and that "he will not compel the city by legal process or otherwise to pay for the improvement out of any other fund," is guilty of such neglect and unreasonable delay as to render it liable in an action for damages at the hands of the holders of warrants issued in payment for such improvements, where it has failed for five years to press to trial an injunction suit restraining the collection of the assessment necessary to make such payment.—*Commercial National Bank v. City of Portland*, 138.
6. **FRONTAGE ASSESSMENT FOR STREET IMPROVEMENTS.**—An assessment by the front foot is valid and constitutional under a city charter providing that each lot or part thereof shall be liable in whole or in part for the cost, as the council may determine, of making a proposed improvement upon the half-street in front thereof, and that the council may assess upon each lot or part thereof its proportionate share of said costs. The rule for assessing the expense not having been prescribed, the assessment may be made by the front foot in the discretion of the city authorities, if that mode seems to them most likely to determine the actual cost.—*Wilson v. City of Salem*, 501.

MUNICIPAL CORPORATIONS—CONCLUDED.

7. **STREET IMPROVEMENTS—ESTOPPEL.**—Property owners who have had notice and an opportunity to be heard in regard to an assessment for a public improvement, will not be granted relief in a court of equity against such assessment as unequal and unjust, where they failed to appear and make their objection at the proper time. They are estopped by their own conduct from alleging any irregularities in the proceedings; and will be heard only to show that proceedings are totally void.— *Wilson v. City of Salem*, 504.
8. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—NOTICE—MATERIAL.**—Abutting property owners cannot complain of a change in the material used in a street improvement from that named in the original notice of intention to improve, where the material adopted is cheaper and more serviceable than the original.— *Barkley v. Oregon City*, 515.
9. **MUNICIPAL CORPORATIONS—SIGNATURES TO NOTICE.**—A provision in the charter of a city allowing a street improvement to be made when the owners of two thirds of the adjoining property petition for it, requires the petition to be signed only by the owners of two thirds of the property, and not by two thirds of the whole number of owners.— *Barkley v. Oregon City*, 515.

MURDER.

- Competency and Credibility of Dying Declarations. See **CRIMINAL LAW**, 3, 4.
 Evidence of Dying Declarations. See **CRIMINAL LAW**, 1, 2, 4.
 Heat of Passion. See **CRIMINAL LAW**, 11.

MUTUAL ACCOUNTS.

1. **INTEREST—CODE, § 3587.**—Where a person owes for rent, and furnishes goods and makes repairs against his rent account, there is a case of mutual accounts, and no interest can be allowed either party until the difference between the opposing accounts has been adjusted and settled.— *Callin v. Knott*, 2 Or. 321, approved and followed; *Pengra v. Wheeler*, 532.
2. **IDEM.**—Accounts purchased from third parties are not mutual accounts so as to prevent the running of interest upon them, under Hill's Code, § 3587, providing for interest on accounts from the day the balance is ascertained.— *Pengra v. Wheeler*, 532.

MUTUALITY.

- In Contract to Sell Land. See **SPECIFIC PERFORMANCE**, 1, 7.
 In Contract to Buy Land. See **SPECIFIC PERFORMANCE**, 4.

NEGLECT as a ground for setting aside a Judgment for Costs and Disbursements.—
Weiss v. Meyer, 108.

NEGLIGENCE.

1. **NEGLIGENCE—ELECTRIC WIRE.**—It is negligence to allow a wire which, from its environment, is liable to become charged with electricity, to hang in or over a street or sidewalk at such a height as to obstruct and endanger ordinary travel.— *Ahern v. Oregon Telephone Co.* 276.
2. **IDEM.**—A telephone company which, instead of removing its wire on taking it out of a residence, leaves it hanging upon an electric-light company's pole, is bound to look after it, and is liable for an injury to a traveler who comes in contact with it after it has been removed by employees of the electric-light company and hung upon a telephone pole, where it is accidentally touched by a traveler on a sidewalk while it was charged by contact with an electric-light wire or a street railway company's wire.— *Ahern v. Oregon Telephone Co.* 276.
3. **NEGLIGENCE—PROXIMATE CAUSE.**—Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk, is a proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric-light company or a

NEGLIGENCE—CONCLUDED.

street-railway company, at least where it does not appear that these were out of their proper position.—*Ahern v. Oregon Telephone Co.* 276.

NEGOTIABILITY of Commercial Paper. See **BILLS AND NOTES**, 1, 4.

NEW TRIAL.

1. **DISCRETION OF COURT.**—A motion to set aside a verdict, or to grant a new trial, because of insufficiency of the evidence, in both civil and criminal cases, is addressed to the sound discretion of the trial court, and its ruling thereon cannot be assigned as error on appeal.—*State v. Foot You*, 62.

NONSUIT.

1. **SUFFICIENCY OF EVIDENCE.**—A motion for a nonsuit is in the nature of a demurrer to the evidence,—it admits the truth of the plaintiff's testimony, together with every inference of fact which the jury may legally draw from it. The sufficiency of the evidence is for the jury, provided the court shall be of opinion that there is any evidence tending to sustain the complaint.—*Brown v. Oregon Lumber Co.* 315.

NORTHERN PACIFIC LAND GRANT.

Letters on Land Grant—Title by Relation. See **LAND GRANTS**, 1.

NOTES. See **BILLS AND NOTES**.

NOTICE of Mechanic's Lien. See **MECHANIC'S LIEN**.

1. **POSSESSION OF REAL PROPERTY AS NOTICE TO PURCHASER.**—It is a general rule that open, notorious, and exclusive possession and occupation of land by a stranger to the title is sufficient to put a purchaser from a vendor who is out of possession upon inquiry as to the legal and equitable rights of the party in possession.—*Exon v. Dancke*, 110.
2. **DEED ABSOLUTE IN FORM—NOTICE—UNRECORDED DEFEASANCE.**—Continued possession of land by the grantor in an absolute recorded deed thereof is not notice to a *bona fide* purchaser from the grantee in the deed of the grantor's equity under an unrecorded defeasance, within the meaning of section 3029, Hill's Code.—*Exon v. Dancke*, 110.
3. **PARTIES—SERVICE OF NOTICE OF APPEAL.**—In an action to enforce a lien against a vessel, where the claimant files a bond with sureties to obtain its release, and judgment is rendered against both the claimant and the sureties, the claimant need not serve notice of its appeal on the sureties, since their interests are identical with those of the claimant.—*The Victorian*, 121.
4. **MINES—NOTICE OF LOCATION.**—Posting a notice of location at the discovery shaft of a mine, and marking the boundaries of the claim by blazing the trees, squaring stumps, and driving stakes, is a sufficient compliance with the Rev. Stat. U. S. § 2324, providing that the location must be distinctly marked on the ground so that its boundaries can be readily traced.—*Allen v. Dunlap*, 229.
5. **MINING CLAIM—NOTICE OF LOCATION.**—A notice of location of a mining claim alleging the location of one thousand five hundred linear feet, commencing at the notice, and running seven hundred and fifty feet in a south westerly direction, and seven hundred and fifty feet in a northeasterly direction, with three hundred feet on each side, is not open to the construction of being seven hundred and fifty feet in one direction, and then back to the starting point.—*Allen v. Dunlap*, 229.
6. **QUIT-CLAIM DEED—BONA FIDE PURCHASER.**—One who takes by a quit-claim deed land on which are ditches then being used to divert water to the lands of another, is chargeable with notice of the latter's rights to the water, since the grantee in such a deed is never an innocent purchaser without notice.—*Low v. Schaffer*, 239.

NOTICE—CONCLUDED.

7. **LAND SOLD FOR TAXES—BONA FIDE PURCHASER.**—Where an owner in possession of land purposely permits it to be sold for taxes in order to cut off a prior lien, any purchaser other than the owner takes the title subject to the prior lien, and all persons taking from such purchaser with notice will also hold subject to the prior lien; but *bona fide* purchasers from the tax sale purchaser, without notice, take freed from the prior lien.—*Nickum v. Gaston*, 330.
8. **COUNTY ROADS—NOTICE—JURISDICTION—CODE, § 4063.**—Under section 4063, Hill's Code, providing that notice to establish a county road shall be served by posting it in several public places for thirty days, the notice must name with reasonable certainty the time when the notice will be presented, and the fact that actual knowledge of the intended proceeding has come to the knowledge of a person to be affected cannot aid a defective notice. An undated notice is insufficient to confer jurisdiction in a road proceeding.—*Bitting v. Douglas County*, 406.
9. **KNOWLEDGE—PUBLIC WRITINGS.**—Knowledge of a fact is always notice thereof, provided such knowledge be such as to prompt a reasonably prudent man to make inquiry which, when prosecuted, would lead him to discover the fact by which he would be affected. Idle rumors and vague suspicions are not enough, nor are general assertions made by strangers, or hearsay statements. Public writings, of course, are always notice, whether seen by the person to be affected or not.—*Jones v. Gates*, 411.
10. **CONSTITUTIONALITY OF CITY CHARTER—NOTICE.**—A city charter giving power to improve streets at the expense of the abutting property is not unconstitutional, as depriving persons of property without due process of law, because it does not expressly provide for notice to the property owners; for the power of improving the streets and assessing the property therefor must be exercised subject to constitutional limitations, and notice must be given, notwithstanding the charter does not specially require it, though the city will have a broad discretion with reference to the kind of notice and the manner of giving it.—*Wilson v. City of Salem*, 504.
11. **ASSESSMENTS—CONSTRUCTIVE NOTICE.**—Where an assessment has been made in accordance with the provisions of law, the fact that the property owners thereby affected had no actual knowledge of what was done, is immaterial,—they are chargeable with constructive notice.—*Barkley v. Oregon City*, 515.
12. **NOTICE OF MEETING TO EQUALIZE ASSESSMENTS—PRESUMPTION.**—In a suit to restrain the collection of street assessments, where the record shows that the council fixed a time for the meeting to equalize the assessments, and the complaint does allege that the notice was not given, it will be presumed that the required notice of the meeting was given.—*Barkley v. Oregon City*, 515.
13. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—NOTICE—MATERIAL.**—Abutting property owners cannot complain of a change in the material used in a street improvement from that named in the original notice of intention to improve, where the material adopted is cheaper and more serviceable than the original.—*Barkley v. Oregon City*, 515.
14. **MUNICIPAL CORPORATIONS—SIGNATURES TO NOTICE.**—A provision in the charter of a city allowing a street improvement to be made when the owners of two thirds of the adjoining property petition for it, requires the petition to be signed only by the owners of two thirds of the property, and not by two thirds of the whole number of owners.—*Barkley v. Oregon City*, 515.

NOTICE OF APPEAL.

1. **ASSIGNMENTS OF ERROR MUST BE SPECIFIC.**—An assignment of error that covered the entire charge to the jury, without specifying any particular sentence or proposition on which appellant proposes to rely, is too indefinite, and presents no question for review in the supreme court.—*Jensen v. Foss*, 158.

NOTICE OF APPEAL—CONCLUDED.

2. **SERVICE ON ADVERSE PARTY**—CODE, §537.—Every party to a litigation who is interested in sustaining the judgment or decree appealed from is an "adverse party" within the meaning of section 537 of Hill's Code, and must be served with the notice of appeal. Within this rule a married woman who has executed a mortgage on two tracts of land, one of which is the property of her husband, is an "adverse party" to an appeal by the husband and his creditors from a judgment of foreclosure of such mortgage, finding that the debt was contracted for family supplies, and decreasing the sale of both tracts, and personal judgments for deficiency against both husband and wife.—*Moody v. Miller*, 179.
3. **IDEM—DEFAULT**.—The fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such party with notice of appeal.—*Moody v. Miller*, 179.

OBLIGATION OF COUNTY to pay its proportion of the state taxes is a "corporate obligation" within the meaning of section 2239, Hill's Code.—*State v. Baker County*, 141.

OBJECTIONS TO CONFIRMATION OF SALE. See **EXECUTION SALES**, 1, 2.

OBJECTIONS TO COST BILL. See **COSTS**, 2, 3, 4.

OBJECTIONS TO VENUE will not be considered after the case has been tried, they should be interposed at the proper time as provided by section 388 of Hill's Code.—*Johnston v. Wadsworth*, 494.

OPINION EVIDENCE. See **EVIDENCE**, 17.

OPTION TO PURCHASE.

Mutuality of Contract—Specific Performance. See **CONTRACTS**, 3, 12.

Consideration for Option to Purchase. See **CONTRACTS**, 4, 5, 12.

Action by Assignee for Specific Performance. See **SPECIFIC PERFORMANCE**, 2.
Specific Performance. See **CONTRACTS**, 3, 17.

OPTION TO SELL.

Mutuality of Contract—Specific Performance. See **CONTRACTS**, 3, 12.

Consideration for Option. See **CONTRACTS**, 4, 5, 12.

Specific Performance of Option. See **CONTRACTS**, 3, 17.

ORDER FOR PUBLICATION.

SUMMONS—RECITALS IN ORDER—CODE, §56.—The affidavit for publication of a summons must show the existence of all the jurisdictional facts required by statute, but the order for publication need not contain any recitals of fact whatever, and if it does contain any they are merely surplusage,—the order is only the conclusion of the court based upon the affidavit. Jurisdiction in cases of published summons is based upon the affidavit, and not on the recitals of fact found in the order.—*Goodale v. Coffee*, 346.

ORDINANCES.

PUBLICATION OF ORDINANCES.—When ordinances are required to be published before they shall go into effect, this requirement is essential and the publication must be in the designated mode.—*Grafton v. City of Sellwood*, 118.

OWNER may not purchase at tax sale that he has fraudulently caused. See **VENDOR AND PURCHASER**.

PAROL EVIDENCE.

To Show Ownership of Stolen Property. See **EVIDENCE**, 22.

To Identify Property Named in Chattel Mortgage. See **CHATTEL MORTGAGE**, 5.

To Vary Written Contract. See **EVIDENCE**, 15, 16.

PARTIES.

1. **PARTIES TO AN APPEAL—JURISDICTION—CODE, § 537.**—Every party is "an adverse party," within the meaning of section 537, Hill's Code, whose interests in relation to the judgment or decree appealed from are in conflict with the modification or reversal sought by the appeal.—*The Victorian*, 121.
2. **SERVICE OF NOTICE OF APPEAL.**—In an action to enforce a lien against a vessel, where the claimant files a bond with sureties to obtain its release, and judgment is rendered against both the claimant and the sureties, the claimant need not serve notice of its appeal on the sureties, since their interests are identical with those of the claimant.—*The Victorian*, 121.
3. **SERVICE OF NOTICE OF APPEAL—CODE, § 537.**—Every party to a litigation who is interested in sustaining the judgment or decree appealed from is an "adverse party" within the meaning of section 537 of Hill's Code, and must be served with the notice of appeal. Within this rule a married woman who has executed a mortgage on two tracts of land, one of which is the property of her husband, is an "adverse party" to an appeal by the husband and his creditors from a judgment of foreclosure of such mortgage, finding that the debt was contracted for family supplies, and decreeing the sale of both tracts, and personal judgments for deficiency against both husband and wife.—*Moody v. Miller*, 179.
4. **IDEM—DEFAULT.**—The fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such party with notice of appeal.—*Moody v. Miller*, 179.
5. **SUFFICIENCY OF SUMMONS—NAMES OF PARTIES IN PUBLISHED SUMMONS—CODE, § 56—AMENDMENT.**—Where, in a suit to foreclose a mechanic's lien, only the property owners are made defendants in the complaint, and afterwards, by stipulation with the plaintiff, other lien claimants appear and file answers setting up their respective liens, but do not serve any summons, the filing of such answers does not constitute an amendment of the complaint in any respect, and the published summons is sufficient under Hill's Code, § 56, requiring a published summons to contain the title of the cause, though it does not name any of the intervening lien claimants as parties.—*Goodale v. Coffee*, 346.

PARTNERSHIP.

1. **Right to an Accounting after Matters in Dispute have been submitted to Arbitration.** See **ARBITRATION AND AWARD**, 1.
2. **DISSOLUTION OF PARTNERSHIP—ACCOUNTING—RECEIVER.**—In a suit for the dissolution of partnership, and an accounting, the court should appoint a receiver to convert the property into cash, and should award each partner his share of the net assets, after payment of firm liabilities, less what he may have already received.—*Durkheimer v. Heilner*, 270.
3. **AUTHORITY OF PARTNER—EVIDENCE OF RATIFICATION.**—The fact that a firm took possession of property that one of the partnership had purchased tends to show his authority to bind the firm, or, at least, their ratification of his acts.—*Dusan v. Mcervie*, 523.
4. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Where both members of a partnership agree with the maker of a promissory note due to one of them that the amount of such note may be applied to the payment of a demand by such holder against the firm, but the note is assigned after maturity to another person, instead of being cancelled, the one may be offset against the other.—*McDonald v. Mackenzie*, 578.
5. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Ordinarily a debt due by one partner cannot be set off against a debt due to the firm, even though it is so agreed with the partner owing the debt, yet it may be done with the consent of all the partners.—*McDonald v. Mackenzie*, 578.

PARTY-WALLS.

1. **EASEMENT.**—Easements in party-walls are mutual, and relate to the wall only; they continue only so long as the walls remain safe and suitable for use.—*Odd Fellows' Association v. Hegele*, 16.
2. **PARTY-WALL AGREEMENT—EASEMENT.**—A provision in a party-wall agreement that the rights of the parties shall continue "so long as the wall shall stand," does not mean so long as any fragment of the wall itself shall remain, but it means so long as the wall shall continue fit and suitable for its purpose; and this construction of such a clause does not confer any perpetual right or easement.—*Odd Fellows' Association v. Hegele*, 16.

PAYMENTS.

EVIDENCE.—The withdrawal from the consideration of the jury of all testimony in regard to payments not made directly on a contract in suit, is reversible error where money was due for former work at the time the contract was entered into, and the payments were made on account without special reference to such former work or to the work done under the contract, as this was virtually withdrawing from the jury all evidence of payment and left them no basis on which to compute the amount remaining due on the contract.—*Johanson v. Hamilton*, 320.

PLAT.

EXPENSE OF PREPARING A PLAT of land in dispute is not a disbursement.—*Weiss v. Meyer*, 108.

PLEADINGS.

1. **FRIVOLOUS PLEADING.**—The test of frivolousness in pleading is whether or not it incontrovertibly so appears from the mere reading of it; if so, then it is frivolous, but if argument is required to show that the pleading is bad, it is not frivolous.—*The Victorian*, 122.
2. **MOTION TO STRIKE OUT—DEMURRER.**—The proper way to test the sufficiency of a pleading is by a demurrer and not by a motion to strike out.—*The Victorian*, 122.
3. **PLEADING—DEFECT CURED BY ANSWER.**—A complaint in an action on an attachment bond which provided for the payment of all damages sustained by the attachment if the same should prove wrongful and without sufficient cause, should state that the attachment was wrongful or without sufficient cause, but such an omission is cured by answering over.—*Drake v. Sworts*, 198.
4. **VARIANCE—CODE, § 98.**—In an action against a telephone company for damages for carelessly permitting a wire heavily charged with electricity to hang dangerously low in a public street, it is not a fatal variance to allege that while passing along the street plaintiff came in contact with the wire, which he was unable to see owing to the darkness, and that upon attempting to remove it from his way, he was shocked and burned by electricity, and upon the trial to show that while passing along the street plaintiff slipped, and in groping about for his packages which had fallen, touched the wire and was so injured; this is a variation of the circumstances and particulars, but the real cause of complaint, viz., the negligence of the defendant, appears as much from one set of circumstances as from the other. This shows an immaterial variance, but not a failure of proof.—*Ahern v. Oregon Telephone Co*, 276.
5. **DIVORCE—PLEADING CONDONATION.**—In a divorce suit defendant may take advantage of the defense of condonation without pleading it.—*Hull v. Hull*, 416.
6. **DIVORCE—ADMISSIONS IN PLEADINGS.**—Admissions in an answer in divorce proceedings do not warrant a decree, but plaintiff must establish a good cause of suit independently of them.—*Hull v. Hull*, 416.
7. **PLEADING ESTOPPEL.**—It is now the settled rule in Oregon that an estoppel *in pais* must be pleaded to be available as a defense.—*Bruce v. Phantix Insurance Company*, 486.

PLEADINGS—CONCLUDED.

8. SALE.—A complaint alleging a sale of plaintiff's right, title, and interest in certain chattels, and a taking possession by defendant, is sufficient without alleging what interest plaintiff owned.—*Dusan v. Meserve*, 523.
9. ACT OF GOD AS A DEFENSE.—The act of God rendering performance impossible, if relied on as a defense, must be pleaded.—*Pengra v. Wheeler*, 532.
10. PLEADING—ANSWER TO COMPLAINT CONTAINING SEVERAL CAUSES OF ACTION—CODE, § 73.—In answering a complaint which contains several causes of action, and such answer contains several defenses, each defense pleaded should refer to the cause of action which it is intended to answer, as required by section 73 of the Code.—*Hindman v. Edgar*, 581.

FLEDGE. See CHATTEL MORTGAGES, 2.

POSSESSION.

Of Real Property as Notice of an Unrecorded Defeasance. See NOTICE, 2, 3.
Of Purchased Property—Statute of Frauds—Memorandum of Sale. See STATUTE OF FRAUDS, 2.

PRACTICE IN CIVIL CASES.

Additional Finding of Fact. See APPEALS, 11.
Affidavit for Change of Venue. See AFFIDAVIT.
Appeals—Necessary Parties. See APPEALS, 6, 7.
Bill of Exceptions Must Show Error. See BILL OF EXCEPTIONS.
Change of Venue—Misdemeanors. See JUSTICES' COURTS, 1.
Costs—Findings of Fact. See COSTS, 8.
Costs—Discretion of Court. See DISCRETION OF COURT, 3.
Cost Bill—Time for Filing Objections. See COSTS, 2.
Discretion of Court. See DISCRETION OF COURT.
Error not Excepted to. See APPEALS, 3.
Exception to Series of Instructions. See EXCEPTIONS, 2.
Findings of Fact. See FINDINGS OF FACT.
General Exceptions to Instructions. See EXCEPTIONS, 3.
Journal Entry cannot be Contradicted Collaterally. See APPEAL, 3.
Motion for New Trial. See DISCRETION OF COURT, 1.
Motion to Set Aside Verdict. See DISCRETION OF COURT, 1.
Notice of Appeal—Necessary Parties. See APPEALS, 6, 7.
Referee's Report. Conflicting Evidence. See REFEREE'S REPORT.

PRACTICE IN CRIMINAL CASES.

Appeal. Error not excepted to. See APPEAL, 4.
Appeal. Weight of Testimony. See APPEAL, 5.
Bill of Exceptions. See CRIMINAL LAW, 6.
Discretion of Court. See DISCRETION OF COURT.
Experiments not Allowable. See CRIMINAL LAW, 17.
Harmless Error. See CRIMINAL LAW, 16.
Insufficiency of Evidence. See DISCRETION OF COURT, 1.
Jury Trial. Remarks of Court. See CRIMINAL LAW, 14.
Motion for New Trial. See DISCRETION OF COURT, 1.
Remarks by Court. Jury Trial. See CRIMINAL LAW, 14.
Verdict. Sufficiency of Evidence. See CRIMINAL LAW, 9.

PRACTICE IN PROBATE CASES.

Rejected Claim. Statute of Limitation. See PROBATE PRACTICE, 2.

PRACTICE IN PROBATE CASES—CONCLUDED.

Rejected Claim. Sufficiency of Evidence. See PROBATE PRACTICE, 1.
 Probating Foreign Will. See PROBATE PRACTICE, 3.

PRE-EMPTION CLAIM.

COMMUTING HOMESTEAD ENTRY—PRE-EMPTION.—The commuting of a homestead entry, under U. S. Rev. Stat. § 2301, by paying money in lieu of the time settlement, does not change the entry into a pre-emption.—*Johnson v. Bridgely Lumbering Co.* 182.

PREFERRING CREDITORS.

FRAUDULENT CONVEYANCE—PREFERRING CREDITORS.—A debtor, even in falling circumstances, may prefer a creditor, and may appropriate his property to the satisfaction of such creditor's claim; nor is it material that the creditor knew his debtor's financial condition.—*Marquam v. Sengfelder*, 2.

PRESUMPTIONS.

1. AN UNRECORDED LIEN created by a lease is only presumptively fraudulent.—*Marquam v. Sengfelder*, 2.
2. PROCEEDINGS OF A BOARD OF EQUALIZATION are presumably regular when jurisdiction has once been acquired.—*Becker v. Malheur County*, 217.
3. PRESUMPTION OF HARMLESS ERROR.—When prejudicial error affirmatively appears on the face of the record, the appellate court cannot presume that it was harmless; the matter rendering it harmless should appear in the bill of exceptions.—*Nickum v. Gaston*, 381.
4. NOTICE OF MEETING TO EQUALIZE ASSESSMENTS—PRESUMPTION.—In a suit to restrain the collection of street assessments, where the record shows that the council fixed a time for the meeting to equalize the assessments, and the complaint does not allege that the notice was not given, it will be presumed that the required notice of the meeting was given.—*Barkley v. Oregon City*, 515.

PRINCIPAL AND AGENT. See AGENTS.**PRIOR APPROPRIATION OF WATERS.**

Appropriation of Water is an Appropriation of Tributaries. See WATERS, 2, 4.
 Appropriation. Title by Relation. See WATERS, 5.

PRIVATE CITIZEN cannot bring suit in his own name to enjoin the location of a public institution at a different place from that designated by law, without alleging that his property will thereby be subjected to an additional burden of taxation, or that he will sustain some other special injury.—*Sherman v. Belkows*, 553.

PRIVILEGE.

Statements by Witnesses are Presumptively Privileged—Malice must be Proven. See LIBEL AND SLANDER, 2.

Newspaper Publishers—Falsely imputing a Crime to a Candidate for Public Office. See LIBEL AND SLANDER, 3, 4.

PROBATE PRACTICE.

1. REJECTED CLAIM—SUFFICIENCY OF EVIDENCE—CODE, § 1134.—Where, in an action by a daughter against her father's executor to establish a rejected claim against his estate, she introduces in evidence a power of attorney from her to her father to sell certain real estate and to manage the proceeds thereof, and a deed showing such sale by him for a designated amount nearly twenty years before, and testifies herself that he had sent her only a few dollars, she has made out a sufficient case under Hill's Code, § 1134, providing that no rejected claim shall be allowed except upon competent evidence other than the testimony of the claimant.—*Quinn v. Gross*, 147.
2. CLAIM AGAINST ESTATE—STATUTE OF LIMITATIONS.—A claim by a daughter against the estate of her father for the proceeds of land sold by him seven-

PROBATE PRACTICE—CONCLUDED.

teen years before his death, under a power of attorney appointing him her agent to sell her real property and care for the proceeds, is not barred by the statute of limitations until the statutory period after the termination of the agency, or after notification by the agent to the daughter that the proceeds of the sale were at her disposal.—*Quinn v. Gross*, 147.

3. **REQUISITES FOR PROBATING A FOREIGN WILL**—CODE, §§ 731, 3082.—To render a foreign will effective to convey real estate in Oregon under the law as it existed prior to 1891, it must not only have been executed in the manner prescribed by the law of this state, but must also have been proved in the foreign jurisdiction in the manner required by the Oregon law (Hill's Code, § 3082); and this entire record must have been authenticated in the manner provided by section 731, Hill's Code.—*Re Clayson's Will*, 542.

PROMISSORY NOTES. See BILLS AND NOTES.**PROOF OF LOSS.**

Waiver of Proofs of Loss. **See INSURANCE.**

PROXIMATE CAUSE.

NEGLIGENCE—PROXIMATE CAUSE.—Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk, is a proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric-light company or a street-railway company, at least where it does not appear that these were out of their proper position.—*Ahern v. Oregon Telephone Co.* 276.

PUBLICATION OF SUMMONS.

Names of Parties in Published Summons—Recitals in Order. **See SUMMONS**, 1, 2.

PUBLIC LANDS.

1. **PUBLIC LANDS—HOMESTEAD—TIMBER LAND.**—The fact that a tract of land is such as might be acquired under the Timber Act (20 U. S. Stat. 89), does not preclude anyone from acquiring title thereto under the homestead laws, if entry is made before anyone applies to purchase under the former act.—*Johnson v. Bridal Veil Lumbering Co.* 182.
2. **PUBLIC LANDS—CONCLUSIVENESS OF DECISION OF LOCAL LAND OFFICERS.**—The approval by local officers of final proof of a homestead entry which has been commuted, and the receipt and acknowledgment of the money therefor, is conclusive, in the absence of any allegation of fraud, that the land was of such character as could be acquired under the homestead laws of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.
3. **FORFEITURE OF LAND GRANT—TITLE BY RELATION.**—One who at the time of the forfeiture of the Northern Pacific Land Grant by the Act of Congress of September 29, 1890, was an actual settler on such grant, and who, within six months after the passage of that act, made claim to his tract under the homestead law, will be considered as an actual settler from the date when he actually settled on the tract; and a railroad company cannot, at any time subsequent to such actual settlement, locate its right of way over such settler's land under the act of Congress of March 3, 1875, granting rights of way over the public lands of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.
4. **COMMUTING HOMESTEAD ENTRY—PRE-EMPTION.**—The commuting of a homestead entry, under U. S. Rev. Stat. § 2301, by paying money in lieu of the time settlement, does not change the entry into a pre-emption.—*Johnson v. Bridal Veil Lumbering Co.* 182.

Water Rights. **See WATERS.**

PUBLIC RECORDS. See PUBLIC WRITINGS.

PUBLIC WRITINGS.

NOTICE—KNOWLEDGE.—Knowledge of a fact is always notice thereof, provided such knowledge be such as to prompt a reasonably prudent man to make inquiry which, when prosecuted, would lead him to discover the fact by which he would be affected. Idle rumors and vague suspicions are not enough, nor are general assertions made by strangers, or hearsay statements. Public writings, of course, are always notice, whether seen by the person to be affected or not.—*Jones v. Gates*, 411.

PUBLISHING ORDINANCES.

When ordinances are required to be published before they shall go into effect, this requirement is essential and the publication must be in the designated mode.—*Grafton v. City of Sellwood*, 118.

QUIT-CLAIM DEED. See DEED, 3.

RATIFICATION of Partner's Acts. See PARTNERSHIP, 3.

REAL PARTY IN INTEREST.

REDELIVERY BOND IN REPLEVIN—CODE, § 137.—A delivery bond in replevin may, under Hill's Code, § 137, be given to the sheriff, made payable to the plaintiff as the real party in interest; and of course suit may be maintained thereon by the plaintiff in his own name under section 27, Hill's Code.—*Kimball v. Bleick*, 59.

REAL PROPERTY.

Sufficiency of Description in Deed. See DEED, 1.

Possession as Notice to Purchaser. See NOTICE, 2.

Declarations Asserting Title as Evidence. See EVIDENCE 5.

Classification by State Board of Equalization. See BOARD OF EQUALIZATION, 2.

RECEIVER.

DISSOLUTION OF PARTNERSHIP—ACCOUNTING—RECEIVER.—In a suit for the dissolution of a partnership, and an accounting, the court should appoint a receiver to convert the property into cash, and should award each partner his share of the net assets, after payment of firm liabilities, less what he may have already received.—*Durkheimer v. Hellner*, 270.

RECITALS.

1. **PUBLICATION OF SUMMONS—ORDER—CODE, § 54.**—The affidavit for publication of a summons must show the existence of all the jurisdictional facts required by statute, but the order for publication need not contain any recitals of facts whatever, and if it does contain any they are merely surplusage.—the order is only the conclusion of the court based upon the affidavit. Jurisdiction in cases of published summons is based upon the affidavit, and not on the recitals of fact found in the order.—*Goodale v. Coffee*, 316.

2. **RECITALS IN JOURNAL ENTRY** cannot be contradicted in the Supreme Court by a memorandum or affidavit of the clerk of the trial court.—*Hislop v. Moldenhauer*, 101.

RECORDING ASSIGNMENTS OF MORTGAGES. See MORTGAGES, 2.

RE-DELIVERY BOND.

1. **REPLEVIN—REAL PARTY IN INTEREST—CODE, § 137.**—A delivery bond in replevin may, under Hill's Code, § 137, be given to the sheriff, made payable to the plaintiff, as the real party in interest; and of course suit may be maintained thereon by the plaintiff in his own name under section 27, Hill's Code.—*Kimball v. Bleick*, 59.

2. **DISCHARGING ATTACHMENT BY RE-DELIVERY BOND—CODE, § 164.**—The execution and delivery by a defendant in an attachment action of a re-delivery bond, conditional for the return of the property or its value, in case plaintiff

RE-DELIVERY BOND — CONCLUDED.

shall obtain judgment, as provided for by section 154, Hill's Code, does not dissolve the lien of the attachment, nor is it a waiver of the right of action on the attachment bond. The giving of a bail bond under sections 159 and 160, Hill's Code, will dissolve an attachment, but such is not the effect of a bond under section 154.—*Drake v. Sworts*, 198.

REFEREE'S REPORT.

REFEREE'S REPORT — APPEAL.—The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party, or to sustain the findings as made.—*Bruce v. Phoenix Ins. Co.* 486; *Hummel v. Frisco*, 586; *Buchtel v. Bode*, 587.

REFORMATION OF INSTRUMENTS. See FRAUD, 5, 6, 8.

RELIEF FROM JUDGMENT.

DISCRETION OF COURT — CODE, § 102.—Under Hill's Code, § 102, providing that the court may relieve a party from a judgment taken against him through his mistake, only a plain abuse of discretion in refusing relief will be reviewed.—*Lovejoy v. Willamette Locks Co.* 569.

REMARKS BY COURT. See JURY TRIAL.

REMOTE CAUSE. See PROXIMATE CAUSE.

REPEAL OF STATUTE.

Without a Saving Clause as to matters pending will not be construed to affect proceedings commenced before the repealing statute was enacted.—*Smith v. Kelly*, 465.

By Implication — Amendment by Reference to Title. See STATUTORY CONSTRUCTION, 4, 5.

REPLEVIN.

REDELIVERY BOND — REAL PARTY IN INTEREST — CODE, § 137.—A delivery bond in replevin may, under Hill's Code, § 137, be given to the sheriff, made payable to the plaintiff, as the real party in interest; and of course suit may be maintained thereon by the plaintiff in his own name under section 27, Hill's Code.—*Kimball v. Bleick*, 59.

RESCISSION OF CONTRACTS. See CONTRACTS, 1.

RES GESTÆ.

EVIDENCE — HOMICIDE.—On a trial for murder, a declaration of the deceased, made at the time of and during the affray, is admissible as part of the *res gestæ*.—*State v. Henderson*, 100.

RIPARIAN PROPRIETORS.

WATER RIGHTS — APPROPRIATION.—After the natural wants of a prior appropriator of the waters of a stream are satisfied, he, as a riparian proprietor, is not entitled to have the excess flow in the channel of the stream. Each riparian proprietor has the right to the ordinary use of the water flowing past his land to supply his natural wants, and he has the right to use a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors.—*Low v. Schaffer*, 239.

RISK OF EMPLOYMENT. See MASTER AND SERVANT.

ROADS.

Notice as Conferring Jurisdiction. See COUNTY ROADS.

SALE.

1. PLEADING.—A complaint alleging a sale of plaintiff's right, title, and interest in certain chattels, and a taking possession by defendant, is sufficient without alleging what interest plaintiff owned.—*Dusan v. Meserve*, 523.

SALE—CONCLUDED.

2. **STATUTE OF FRAUDS—TAKING POSSESSION.**—An agreement for the sale of property exceeding fifty dollars in value need not be in writing, where the purchaser takes possession of it.—*Dusan v. Meserve*, 523.

SAVING CLAUSE in Repealing Statute. See STATUTORY CONSTRUCTION.**SEAL.**

- CONSIDERATION—STATUTE OF FRAUDS—CODE, § 785.**—A seal is of itself the expression of a consideration sufficient to satisfy the statute of frauds, requiring an agreement or memorandum for the sale of lands to express the consideration.—*Johnston v. Wadsworth*, 494.

SECOND APPEAL cannot be taken after the first one has been dismissed.—*Nestucca Wagon Road Co. v. Landingham*, 439.**SERVICE OF PROCESS. See SUMMONS, 3.****SET-OFF.**

1. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Ordinarily a debt due by one partner cannot be set-off against a debt due to the firm, even though it is so agreed with the partner owing the debt, yet it may be done with the consent of all the partners.—*McDonald v. Mackenzie*, 573.
2. **BILLS AND NOTES—SET-OFF—DEFENSES TO NOTES TRANSFERRED AFTER MATURITY.**—One who takes negotiable paper after maturity takes it subject not only to equities inherent in the paper, but subject also to all payments, or set-offs in the nature of payments, that may have attached to it in the hands of prior holders.—*McDonald v. Mackenzie*, 573.
3. **SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**—Where both members of a partnership agree with the maker of a promissory note due to one of them that the amount of such note may be applied to the payment of a demand by such holder against the firm, but the note is assigned after maturity to another person, instead of being cancelled, the one may be offset against the other.—*McDonald v. Mackenzie*, 573.
4. **DECREE UPON CLAIM SUBJECT TO SET-OFF—INJUNCTION TO RESTRAIN EXECUTION.**—Where one has obtained a decree upon a note and mortgage, which was subject to a counterclaim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.—*McDonald v. Mackenzie*, 573.

SLANDER AND LIBEL.

Evidence of Plaintiff's Character—Privileged Statements by Witnesses—Malice—Burden of Proof. See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

1. **MUTUALITY OF CONTRACT—OPTION TO PURCHASE—SPECIFIC PERFORMANCE.**—One not bound by a contract cannot call upon a court to enforce specific performance thereof against the other party, by expressing a willingness to accept its terms; but an option to convey real estate or renew a lease may be specifically enforced, without any covenant or obligation to purchase or accept, if made upon a proper consideration, for when the option is accepted, the minds of the parties have met, and the contract thus becomes mutual.—*House v. Jackson*, 89.
2. **ACTION BY ASSIGNEE.**—An option to purchase land may be specifically enforced at the suit of an assignee thereof.—*House v. Jackson*, 89.
3. **SPECIFIC PERFORMANCE—BUILDING CONTRACTS.**—Although specific performance of a building contract will rarely be enforced, a contract agreeing to furnish stone of a peculiar kind, color, quality, and texture which cannot be procured elsewhere, to erect the walls, will be so far enforced as to require the con-

SPECIFIC PERFORMANCE—CONCLUDED.

tractor to permit the owner to take stone sufficient to erect the building, and to use derricks erected at the quarry for hoisting necessary to enable such stone to be taken out, where a large portion of the building has been erected, the contractor is insolvent and unable to complete his contract, and he has received nearly the whole consideration therefor, and it will be necessary if such stone is not furnished to rebuild the structure, or mar its effect by the use of other stone.—*Rector of St. David's v. Wood*, 396.

4. **SPECIFIC PERFORMANCE OF CONTRACT TO PURCHASE LAND—EQUITY.**—Specific performance to enforce a contract for the purchase of land will be granted at the instance of the vendor when he tenders a deed, since the relief asked is not only the payment of money but the acceptance of the deed.—*Johnston v. Wadsworth*, 494.
5. **SPECIFIC PERFORMANCE—VENUE—CODE, § 387.**—A suit for the specific performance of a contract to purchase land is one *in personam* and not *in rem*, and may be brought in a county other than that in which the land lies, notwithstanding section 387 of Hill's Code, providing that suits for the specific performance of agreements relating to real estate shall be commenced and tried in the county where the subject of the suit is situated.—*Johnston v. Wadsworth*, 494.
6. **SPECIFIC PERFORMANCE—WAIVER OF OBJECTION TO VENUE—CODE, § 388.**—The objection that a suit is not brought in the proper county is too late after trial upon the merits.—*Johnston v. Wadsworth*, 494.
7. **CONTRACT TO PURCHASE LAND—MUTUALITY.**—An agreement by a vendor upon a proper consideration to repurchase land if the vendee shall so desire, is not void for want of mutuality, where the option is exercised within the time limited. When the option is exercised the minds of the parties meet and the contract becomes mutual.—*Johnston v. Wadsworth*, 494.

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STATUTE OF FRAUDS.

1. CONSIDERATION—SEAL—STATUTE OF FRAUDS—CODE, § 785.—A seal is of itself the expression of a consideration sufficient to satisfy the statute of frauds, requiring an agreement or memorandum for the sale of lands to express the consideration.—*Johnston v. Wadsworth*, 494.
2. MEMORANDUM OF SALE—TAKING POSSESSION.—An agreement for the sale of property exceeding fifty dollars in value need not be in writing, where the purchaser takes possession of it.—*Duncan v. Meserve*, 523.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—BOAT LIENS—ACCOUNTS—CODE, § 3708.—Where materials are furnished from time to time as they are needed in the construction of a vessel, and several payments are made on account, all the items constitute one continuous account, and the limitation of one year provided by section 3708, Hill's Code, for enforcing a lien for such materials, does not begin to run against each item as it was furnished, but begins from the date of the last item.—*The Victorian*, 121.
2. LIMITATIONS OF ACTIONS BY STATE TO RECOVER TAXES—CODE, § 6.—The obligation of a county to pay its proportion of the state taxes is entirely a creature of statute, and is consequently "a liability created by statute" within the meaning of subdivision 2, section 6, Hill's Code, requiring an action on such a liability to be brought within six years.—*State v. Baker County*, 141.
3. PRINCIPAL AND AGENT—LIMITATION OF ACTION.—A cause of action does not accrue in favor of a principal against an agent until the expiration of the time fixed by the terms of the agency, or a demand by the principal.—*Quinn v. Gross*, 147.
4. *IDEM*.—A claim by a daughter against the estate of her father for the proceeds of land sold by him seventeen years before his death, under a power of attorney appointing him her agent to sell her real property and care for the proceeds, is not barred by the statute of limitations until the statutory period after the termination of the agency, or after notification by the agent to the daughter that the proceeds of the sale were at her disposal.—*Quinn v. Gross*, 147.
5. STATUTE OF LIMITATIONS ON TAX SALES—PURCHASE BY OWNER—FRAUD—CODE, § 2840.—Where an owner in possession of land fraudulently permits it to be sold for taxes in order to cut off a prior lien, and buys in such tax title, either directly or indirectly, the limitation of three years provided by section 2840, Hill's Code, does not apply to actions for the recovery of such property by a prior lien-holder.—*Nickum v. Gaston*, 380.
6. LIMITATION OF ACTIONS—CODE, §§ 16, 26.—The limitation imposed by section 16 of Hill's Code, when considered with section 26, does not apply to a defendant who was a non-resident of the state at the time the cause of action arose.—*Crane v. Jones*, 419.

STATUTORY CONSTRUCTION.

1. STATUTORY CONSTRUCTION—REPEAL WITHOUT SAVING CLAUSE.—A statute repealing or modifying the remedy of a party by suit or action, should not be construed to affect proceedings brought before the repealing statute was enacted. By analogy the assessment of property and levying of a tax thereon having been completed before the statute authorizing such action was repealed, the collection of the tax so levied will not be thereby affected, even though the repealing act contained no saving clause, since everything will relate back to the date of the levy.—*Smith v. Kelly*, 455.

STATUTORY CONSTRUCTION—CONCLUDED.

2. **IDEM—LEGISLATIVE INTENT.**—It is a general rule that the repeal of a special tax law destroys the remedy for enforcing the collection of the tax, unless the remedy be reserved; but when a tax system is revised, and the former law repealed, the legislative intent is presumed to be of prospective force only, and prior valid assessments will not be affected.—*Smith v. Kelly*, 465.
3. **IDEM—CONTEMPORANEOUS STATUTES.**—Contemporaneous statutes and those *in pari materia* should be construed together, for the purpose of arriving at the legislative intent. Within this rule the repeal of certain sections of a tax law, without any saving clause as to the taxes then due and assessed, does not prevent their collection, where it is followed eleven days later by another law providing that such taxes shall be collected in the same manner as had been previously employed.—*Smith v. Kelly*, 465.
4. **CONSTITUTIONAL LAW—AMENDMENT OF STATUTES BY REFERENCE TO TITLE—REPEAL BY IMPLICATION—CONSTITUTION, ARTICLE IV. § 22.**—Statutes not amendatory or revisory in character, but original in form and complete within themselves, exhibiting on their face their purpose and scope, are not within the constitutional prohibition against amending acts by reference to their title (Or. Const. article IV. § 22), notwithstanding they may by implication amend or modify existing laws upon the same subject.—*Warren v. Crosby*, 553.
5. **IDEM—LAWS, 1893, p. 116.**—The act of 1893, p. 116, which provides for collection of taxes, and section 9 of which transfers to county officers the exclusive power to assess and collect taxes for school districts and incorporated towns and cities, is not unconstitutional because it amends city charters and school district acts without setting them out at length. As it amends the other acts only by implication, it is not within the constitutional requirement that amended acts must be set out as amended.—*Warren v. Crosby*, 553.

STOCKS AND STOCKHOLDERS.

1. **Jurisdiction to Enforce Liability of Stockholders Created by Laws of Another State.** See JURISDICTION, 3, 4.
2. **Jurisdiction to Enforce Liability of Stockholders in Oregon Corporations.** See JURISDICTION, 4.

STREET IMPROVEMENTS.

1. **CONSTITUTIONAL LAW—EQUAL TAXATION—STREET AND SEWER ASSESSMENTS.**—The provision of section 1 of article IX. of the state constitution, requiring a uniform and equal rate of assessment and taxation, does not apply to street or sewer assessments, and an assessment for these purposes in proportion to the benefit received is constitutional.—*Masters v. City of Portland*, 161.
2. **MUNICIPAL ASSESSMENTS—LOCAL IMPROVEMENTS.**—A wilful, arbitrary, and intentional omission on the part of a city council to assess a portion of the property benefited by a local improvement, placing the whole burden upon the remaining property, renders the assessment void, even though the direct benefits to the separate parcels are in excess of the assessment thereon.—*Masters v. City of Portland*, 161.
3. **CONTRACT FOR PAYMENT FROM SPECIAL FUND.**—For neglecting to collect a fund to pay for an improvement a city is liable in damages at the hands of the holders of warrants issued in payment for such improvements.—*Com. National Bank v. City of Portland*, 183.
4. **FRONTAGE ASSESSMENT FOR STREET IMPROVEMENTS.**—An assessment by the front foot is valid and constitutional under a city charter providing that each lot or part thereof shall be liable in whole or in part for the cost, as the council may determine, of making a proposed improvement upon the half-street in front thereof, and that the council may assess upon each lot or part thereof its proportionate share of said costs. The rule for assessing the expense not having been prescribed, the assessment may be made by the front foot in the discretion

STREET IMPROVEMENTS—CONCLUDED.

of the city authorities, if that mode seems to them most likely to determine the actual cost.—*Wilson v. City of Salem*, 501.

5. **STREET IMPROVEMENTS—ESTOPPEL.**—Property owners who have had notice and an opportunity to be heard in regard to an assessment for a public improvement, will not be granted relief in a court of equity against such assessment as unequal and unjust, where they failed to appear and make their objection at the proper time. They are estopped by their own conduct from alleging any irregularities in the proceedings; and will be heard only to show that proceedings are totally void.—*Wilson v. City of Salem*, 504.
6. **MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—NOTICE—MATERIAL.**—Abutting property owners cannot complain of a change in the material used in a street improvement from that named in the original notice of intention to improve, where the material adopted is cheaper and more serviceable than the original.—*Barkley v. Oregon City*, 515.
7. **MUNICIPAL CORPORATIONS—SIGNATURES TO NOTICE.**—A provision in the charter of a city allowing a street improvement to be made when the owners of two thirds of the adjoining property petition for it, requires the petition to be signed only by the owners of two thirds of the property, and not by two thirds of the whole number of owners.—*Barkley v. Oregon City*, 515.

SUMMONS.

1. **PUBLICATION—RECITALS IN ORDER—CODE, § 56.**—The affidavit for publication of a summons must show the existence of all the jurisdictional facts required by statute, but the order for publication need not contain any recitals of fact whatever, and if it does contain any they are merely surplusage.—the order is only the conclusion of the court based upon the affidavit. Jurisdiction in cases of published summons is based upon the affidavit, and not on the recitals of fact found in the order.—*Goodale v. Coffee*, 346.
2. **SUFFICIENCY OF SUMMONS—NAMES OF PARTIES IN PUBLISHED SUMMONS—CODE, § 56—AMENDMENT.**—Where, in a suit to foreclose a mechanic's lien, only the property owners are made defendants in the complaint, and afterwards, by stipulation with the plaintiff, other lien claimants appear and file answers setting up their respective liens, but do not serve any summons, the filing of such answers does not constitute an amendment of the complaint in any respect, and the published summons is sufficient, under Hill's Code, § 56, requiring a published summons to contain the title of the cause, though it does not name any of the intervening lien claimants as parties.—*Goodale v. Coffee*, 346.
3. **SERVICE—WRONG NAME—DEFAULT.**—Process served on one by a wrong name is as effectually served as though his right name had been used, and jurisdiction is thereby acquired. A default judgment on such a service is good everywhere.—*Foshier v. Narver*, 441.

SURETIES ON ATTACHMENT BONDS.

Liability for Costs and Disbursements. See *Costs*, 6, 7.

SURVEY.

Expense of making a Survey is not a Disbursement.—*Wells v. Meyer*, 103.

TACKING.

CONTINUITY OF ADVERSE POSSESSION.—Where several persons enter upon land in succession the several possessions cannot be tacked together so as to make a continuity of possession under the law of adverse title, unless there is a privity of estate, or the several titles are connected.—*Low v. Schaffer*, 239.

TAXES AND TAXATION.

VENDOR AND PURCHASER—LAND SOLD FOR TAXES—PURCHASE BY OWNER—PRIOR LIENS NOT AFFECTED.—An owner or mortgagor, or his successor in in-

TAXES AND TAXATION—CONCLUDED.

terest, remaining in possession of land, cannot permit the mortgaged property to be sold for taxes, and become the purchaser thereof, either directly or indirectly, for the purpose of cutting off a prior lien. If the owner himself buy at the tax sale, or if he acquire the tax title from a stranger who purchased at the sale, it will operate only as a payment of the taxes; but if the purchase at the tax sale is made by some third person in pursuance of a fraudulent arrangement with the owner to cut off a prior lien, such third person thereby acquires a title good against every one except those having equities in the premises, among whom will be prior lien-holders.—*Nickum v. Gaston*, 390.

Claim of State Against Counties for Taxes. See COUNTIES, 1, 2.

Classification of Real Property by State Board of Equalization. See BOARD OF EQUALIZATION, 2.

Increase by State Board of Equalization of Assessed Values of Certain Classes of Property. See BOARD OF EQUALIZATION, 3.

Injunction at Suit of Private Citizen Without Showing Increased Taxation or Special Damage. See INJUNCTIONS, 3.

Injunction to Prevent Collection of Taxes—Tender of Tax. See TENDER OF TAX.

Limitation of Actions by State to Recover Taxes. See STATUTE OF LIMITATIONS, 2.

Limitation of Actions to Recover Property Fraudulently Sold by Connivance of owner. See STATUTE OF LIMITATIONS, 5.

Power of County Board of Equalization to Assess Property Overlooked by Assessor. See ASSESSMENTS, 3.

Taxes and Assessments for Streets and Sewers. See ASSESSMENTS, 1, 2.

TENDER OF TAX.

INJUNCTION.—Equity will not interfere by injunction to restrain the collection of a tax unless it is unauthorized, or, if authorized, is assessed upon property not subject to taxation, or the persons imposing it were without authority in the premises, or they have proceeded fraudulently; nor will it interfere in any case until plaintiff has tendered the amount of tax that can be shown to be due. Particularly is this true where the complaint discloses the value of the property, and the rate of taxation, so that the legal tax is a mere matter of computation.—*Welch v. Clatsop County*, 452.

TESTAMENTARY CAPACITY.

WILLS—TESTAMENTARY CAPACITY.—One who though he is seventy-five years of age, subject to severe bodily infirmities, absent minded and irritable, and his memory has failed him to quite an extent, is nevertheless a man of strong will and very difficult to move from an opinion once formed, and has not lost his reasoning powers, and has a good understanding of all business in which he is engaged, has the necessary capacity to make a will.—*In re Cline's Will*, 175.

TIMBER LAND.

PUBLIC LANDS—HOMESTEAD—TIMBER LAND.—The fact that a tract of land is such as might be acquired under the Timber Act (20 U. S. Stat. 89), does not preclude anyone from acquiring title thereto under the homestead laws, if entry is made before anyone applies to purchase under the former act.—*Johnson v. Bridal Veil Lumbering Co.* 182.

TITLE BY RELATION.

1. PUBLIC LANDS—FORFEITURE OF LAND GRANT.—One who at the time of the forfeiture of the Northern Pacific Land Grant by the Act of Congress of September 29, 1890, was an actual settler on such grant, and who, within six months after the passage of that act, made claim to his tract under the homestead law,

TITLE BY RELATION—CONCLUDED

will be considered as an actual settler from the date when he actually settled on the tract; and a railroad company cannot, at any time subsequent to such actual settlement, locate its right of way over such settler's land under the act of Congress of March 3, 1878, granting rights of way over the public lands of the United States.—*Johnson v. Bridal Veil Lumbering Co.* 182.

2. **IRRIGATION—PRIOR APPROPRIATION OF WATER—TITLE BY RELATION.**—One who, two and a half years before the building of a dam by another, settles upon government land, and diverts and appropriates the water of a creek for the purpose of irrigation, is a prior appropriator of such water, although he does not make final proof of his claim and obtain a patent therefor until after the other obtains his patent; in such case the title relates back to the time of the settlement.—*Cole v. Logan*, 304.

TRANSCRIPT must be filed by the second day of the term or the time extended.—*Nesucca Wagon Road Co. v. Landingham*, 439.

TRESPASS AND WASTE.

MINING CLAIM—INJUNCTION.—To the general rule that equity will not grant an injunction in cases of trespass, there is an established exception in favor of mines, where injunctions will be granted to prevent the substance of the estate from being injured or carried away; and such a suit may be maintained by one in possession as a locator, under Rev. Stat. U. S. §§ 2319-2325, without first establishing, or attempting to establish, his title at law.—*Allen v. Dunlap*, 229.

ULTRA VIRES Acts of Corporations. See CORPORATIONS, 1, 2, 3.

UNITED STATES CONSTITUTION. See STATUTES OF OREGON.

UNRECORDED CHATTEL MORTGAGE.

PRESUMPTION OF FRAUD.—Under subdivision 40 of section 776, Hill's Code, (prior to the act of 1893) an unrecorded lien created by a lease was only presumptively fraudulent, since such liens are subject to the same rules as chattel mortgages.—*Marquand v. Sengfelder*, 2.

UNRECORDED DEFEASANCE.

Continued possession of land by the grantor in an absolute recorded deed thereof is not notice to a *bona fide* purchaser from the grantee in the deed of the grantor's equity under an unrecorded defeasance, within the meaning of section 3023, Hill's Code.—*Ezra v. Dancke*, 110.

USAGE. See CUSTOM.

VACATING JUDGMENT FOR COSTS. See JUDGMENT, 2.

VARIANCE.

1. **MECHANICS' LIEN—DESCRIPTION IN NOTICE.**—A notice of lien must correctly describe the property on which the lien is claimed. No lien can be enforced on lots in "Carter's Addition to Portland" when the notice described the property as lots in "Market Street Addition to Portland,"—there is a fatal variance between the claim and the proof.—*Hendy Machine Works v. Pacific Cable Co.* 152.
2. **PLEADING—CODE, § 98.**—In an action against a telephone company for damages for carelessly permitting a wire heavily charged with electricity to hang dangerously low in a public street, it is not a fatal variance to allege that while passing along the street plaintiff came in contact with the wire, which he was unable to see owing to the darkness, and that upon attempting to remove it from his way, he was shocked and burned by electricity, and upon the trial to show that while passing along the street plaintiff slipped, and in groping about for his packages which had fallen, touched the wire and was so injured; this is a variation of the circumstances and particulars, but the real cause of complaint, viz., the negligence of the defendant, appears as much from one set of

VARIANCE—CONCLUDED.

circumstances as from the other. This shows an immaterial variance, but not a failure of proof.—*Ahern v. Oregon Telephone Co*, 276.

VENDOR AND PURCHASER.

1. **CONTRACT—ABSTRACT OF TITLE.**—A purchaser of land under a contract by which the vendor agrees to furnish an abstract "showing a good and clear title free from defects" is entitled to recover back purchase money paid where the abstract furnished does not disclose a good title, although the title tested by the original record and conveyances and other facts not upon the face of the abstract is good and free from defects.—*Kane v. Rippey*, 338.
2. **VENDOR AND PURCHASER—LAND SOLD FOR TAXES—PURCHASE BY OWNER—PRIOR LIENS NOT AFFECTED.**—An owner or mortgagor, or his successor in interest, remaining in possession of land, cannot permit the mortgaged property to be sold for taxes, and become the purchaser thereof, either directly or indirectly, for the purpose of cutting off a prior lien. If the owner himself buy at the tax sale, or if he acquire the tax title from a stranger who purchased at the sale, it will operate only as a payment of the taxes; but if the purchase at the tax sale is made by some third person in pursuance of a fraudulent arrangement with the owner to cut off a prior lien, such third person thereby acquires a title good against every one except those having equities in the premises, among whom will be prior lien-holders.—*Nichols v. Gaston*, 380.
3. **IDEM—NOTICE—BONA FIDE PURCHASER.**—Where an owner in possession of land purposely permits it to be sold for taxes in order to cut off a prior lien any purchaser other than the owner takes the title subject to the prior lien, and all persons taking from such purchaser with notice will also hold subject to the prior lien; but *bona fide* purchasers from the tax sale purchaser, without notice, take freed from the prior lien.—*Nichols v. Gaston*, 380.

Possession of Land as Notice of the Rights of the Person in Possession and of unrecorded Defeasances. See **NOTICE**, 2, 3.

VENUE.

Affidavit for Change of Venue. See **CHANGE OF VENUE**, 1.

Justices' Courts may grant Change in Misdemeanors. See **CHANGE OF VENUE**, 2.

Venue in Suits for Specific Performance. See **SPECIFIC PERFORMANCE**, 5.

Waiver of Objections to Venue. See **SPECIFIC PERFORMANCE**, 6.

VERDICT.

1. **WEIGHT OF TESTIMONY.**—The credibility of witnesses and the weight to be given to testimony are matters for the consideration of the jury, and when a verdict has been approved by the trial court, the appellate court will not review it merely on the weight of the testimony.—*State v. Foot You*, 62.
2. **MOTION TO SET ASIDE.**—A motion to set aside a verdict for insufficiency of the evidence is always addressed to the sound discretion of the trial court, and its ruling thereon will not be reviewed on appeal.—*State v. Foot You*, 62.
3. **INTEREST.**—Failure to fix a rate of interest in a verdict awarding damages with interest thereon from a given date, does not invalidate it as interest in such case must be computed according to the rate provided by law.—*Duson v. Mcervie*, 523.
4. **REMITTING PART OF VERDICT—INTEREST.**—Error allowing interest in a verdict for a longer period than is proper is not reversible error where the excess of interest has been remitted.—*Duson v. Mcervie*, 523.

VESSELS.

Jurisdiction of State Courts to enforce a Lien for building Vessels. See **BOAT LIENS**, 1.

VESSELS—CONCLUDED.

Statute of Limitations against Accounts for Materials used in building Vessels. See **BOAT LIENS**, 2.

Lien on vessels—Payment to Contractor. See **BOAT LIENS**, 3.

WAIVER.

Of Right to Appeal after accepting Benefits of a Judgment or Decree. See **APPEAL**, 1.

Of Proofs of Loss by Fire. See **INSURANCE**, 1.

Of Objections to Venue. See **SPECIFIC PERFORMANCE**, 6.

WALLS. See PARTY WALLS.**WASTE AND TRESPASS.**

Injunction to restrain Waste of a Mining Claim. See **INJUNCTION**, :

WATERS AND WATER RIGHTS.

1. **APPURTENANCES.**—A prior appropriator of the water of a stream, who has a possessory right to the real estate benefited thereby, may by parol transfer his interest in the land as well as his right to use the water; the latter being considered simply as an improvement and passing with the land unless specially reserved.—*Low v. Schaffer*, 239.
2. **PRIOR APPROPRIATION.**—An appropriation of the waters of a stream for a beneficial use, is an appropriation of all tributaries thereto above the point of original diversion, flowing in well-defined channels.—*Low v. Schaffer*, 239.
3. **QUIT-CLAIM DEED—BONA FIDE PURCHASER.**—One who takes by a quit-claim deed land on which are ditches then being used to divert water to the lands of another, is chargeable with notice of the latter's rights to the water, since the grantee in such a deed is never an innocent purchaser without notice.—*Low v. Schaffer*, 239.
4. **APPROPRIATION—RIPARIAN PROPRIETOR.**—After the natural wants of a prior appropriator of the waters of a stream are satisfied, he, as a riparian proprietor, is not entitled to have the excess flow in the channel of the stream. Each riparian proprietor has the right to the ordinary use of the water flowing past his land to supply his natural wants, and he has the right to use a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors.—*Low v. Schaffer*, 239.
5. **IRRIGATION—PRIOR APPROPRIATION OF WATER—TITLE BY RELATION.**—One who, two and a half years before the building of a dam by another, settles upon government land, and diverts and appropriates the water of a creek for the purpose of irrigation, is a prior appropriator of such water, although he does not make final proof of his claim and obtain a patent therefor until after the other obtains his patent; in such case the title relates back to the time of the settlement.—*Cole v. Logan*, 304.
6. **WATER RIGHTS—DILIGENCE AND PECUNIARY CONDITION OF APPROPRIATOR.**—To entitle a claimant of a water privilege to hold his rights, he must commence to divert the water within a reasonable time after his settlement or claim, and must prosecute the work to completion with reasonable diligence. Ill health or pecuniary inability of a claimant will not excuse the failure to actually appropriate the water within a reasonable time.—*Cole v. Logan*, 304.
7. **IDEM.**—One who spends ten years in completing a ditch for purposes of irrigation, over a new survey, after having been compelled to abandon a prior one by reason of encountering quicksand, doing little more in the ten years than he had before in two years in the same kind of land, giving as a reason for his delay his inability to raise the necessary means to prosecute the work,—fails to prosecute the work with such reasonable diligence as will permit his appropriation of water thereunder, to date back to the time of commencing the work.—*Cole v. Logan*, 304.

WATERS AND WATER RIGHTS—CONCLUDED.

8. **IDEM—PURPOSE AND AMOUNT OF APPROPRIATION.**—Water may be appropriated for beneficial purposes in such quantities as may be necessary, provided it be done with reasonable promptness, but such use cannot be suspended for a long time and then resumed to a greater extent than before, to the injury of subsequent appropriators on the stream.—*Cole v. Logan*, 304.
9. **APPROPRIATION OF WATER—ABANDONMENT.**—A prior appropriator of water for the purpose of irrigating his homestead, who, after getting a part of it under cultivation, fails to add to his improvements, and permits a portion of the cultivated part to grow up to willows, will be entitled, as against subsequent appropriators, to only a sufficient amount of water for the irrigation of the cultivated part.—*Cole v. Logan*, 304.
10. **DIVERSION OF WATER.**—A prior appropriator of the water of a creek for irrigating purposes cannot move his point of diversion above the dam of a subsequent appropriator, so as to injuriously affect the latter's rights.—*Cole v. Logan*, 305.

WEIGHT OF TESTIMONY.

1. **COMPETENCY AND CREDIBILITY OF DYING DECLARATIONS.**—The competency of dying declarations is for the court; but, after they have been admitted, their weight and credibility are questions of fact for the jury. The facts that declarations made by the victim of a murder, under sense of impending death, were the result of questions propounded by an attorney, the absence of cross-examination, the use of an interpreter, the presence of friends and prosecuting officers only, and that accused was unrepresented by counsel, are matters affecting merely the weight and credibility, and not the competency, of such declarations.—*State v. Foot You*, 61.
2. **VERDICT—WEIGHT OF TESTIMONY.**—The credibility of witnesses and the weight to be given to testimony are matters for the consideration of the jury, and when a verdict has been approved by the trial court, the appellate court will not review it merely on the weight of the testimony.—*State v. Foot You*, 62.

WILLS.

1. **WILLS—INSANE DELUSIONS.**—A delusion is a belief that has no reasonable basis in fact, and where there are any facts or circumstances that would or might lead the testator to entertain the particular belief that he does, such belief is not a delusion.—*In re Cline's Will*, 175.
2. **IDEM.**—A determination by a testator to disinherit certain children because they were witnesses for their mother in a divorce suit against him, and had sympathized with her in the proceeding, is not an insane delusion rendering him unfit to make a will. However erroneous may have been his beliefs about the children, and their feelings toward him, there was still a basis of fact for them, and such beliefs are not delusions.—*In re Cline's Will*, 175.
3. **WILLS—TESTAMENTARY CAPACITY.**—One who though he is seventy-five years of age, subject to severe bodily infirmities, absent minded and irritable, and his memory has failed him to quite an extent, is nevertheless a man of strong will and very difficult to move from an opinion once formed, and has not lost his reasoning powers, and has a good understanding of all business in which he is engaged, has the necessary capacity to make a will.—*In re Cline's Will*, 175.
4. **REQUISITES FOR PROBATING A FOREIGN WILL—CODE, §§ 731, 3082.**—To render a foreign will effective to convey real estate in Oregon under the law as it existed prior to 1891, it must not only have been executed in the manner prescribed by the law of this state, but must also have been proved in the foreign jurisdiction in the manner required by the Oregon law (Hill's Code, § 3082); and this entire record must have been authenticated in the manner provided by section 731, Hill's Code.—*Re Clayton's Will*, 542.

WITNESSES.

- BLANDER—PRIVILEGED STATEMENTS OF WITNESSES.**—Statements uttered or published by witnesses in the course of judicial proceedings are presumptively

WITNESSES—CONCLUDED.

privileged, and before a witness can be held liable in a civil action this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and were not in response to questions asked by counsel.—*Cooper v. Phipps*, 357.

WRIT OF REVIEW.

BOARD OF EQUALIZATION—INFERIOR TRIBUNALS—PRESUMPTION OF REGULARITY.—

The proceedings of a board of equalization, after it has acquired jurisdiction over a taxpayer, will not be set aside on writ of review because the record does not contain the evidence on which its findings of fact were based, unless it affirmatively appears in the record that the evidence was insufficient to sustain them. This is in pursuance of the rule that when inferior tribunals have once acquired jurisdiction every presumption exists in favor of the regularity of their proceedings.—*Becker v. Malheur County*, 217.

WRITINGS AS NOTICE. See PUBLIC WRITINGS.

WRONG NAME.

SERVICE OF PROCESS—DEFAULT.—Process served on one by a wrong name is as effectually served as though his right name had been used, and jurisdiction is thereby acquired. A default judgment on such a service is good everywhere.—*Foshier v. Narver*, 441.

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